TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. [redacted] 91.

THE PRESIDENT, MANAGERS, AND COMPANY OF THE MONONGAHELA BRIDGE COMPANY, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

FILED MARCH 3, 1908.

(21,053.)

(21,053.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. 650.

THE PRESIDENT, MANAGERS, AND COMPANY OF THE MONONGAHELA BRIDGE COMPANY, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

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0 In the District Court of the United States for the Western District of Pennsylvania.

No. 1, May Term, 1906, Criminal Docket.

THE UNITED STATES
vs.
THE PRESIDENT, MANAGERS, AND COMPANY OF THE MONONGAHELA BRIDGE COMPANY, a Corporation.

Stipulation as to Printing Record.

It is hereby stipulated between the United States, by its attorney, John W. Dunkle, and the President, Managers and Company of the Monongahela Bridge Company, by its attorney, D. T. Watson, that in printing the record in the above entitled cause, the clerk shall omit the following documents and papers filed therein: Motion for rule to show cause why information should not be filed against defendant, order allowing same, proof of service of same on defendant, and order making rule absolute: Writ of *Venire Facias ad Respondendum* commanding defendant to appear and answer information and order directing same to issue: All process issued to secure the attendance of witnesses: Depositions of certain aged and infirm witnesses and stipulation between counsel for taking of same: Plaintiff's requests for instructions to jury: Defendant's requests for instructions to jury: List of jurors: All exhibits introduced in
1 evidence, the material portions of the same being incorporated in the defendant's bill of exceptions.

JOHN W. DUNKLE,
U. S. Attorney for West. Dist. of Penna.
D. T. WATSON,
Attorney for Defendant.

2 [Endorsed:] In the Dist. Court of the U. S. West. Dist. of Penna. No. 1 May Term, 1906 Criminal Docket. The United States *vs.* The President, Managers and Company of the Monongahela Bridge Company, a Corporation. Stipulation as to Printing Record. D. Filed February 19, 1908.

3 In the District Court of the United States for the Western District of Pennsylvania.

No. 1, May Term, 1906.

THE UNITED STATES
vs.
PRESIDENT, MANAGERS, AND COMPANY OF THE MONONGAHELA BRIDGE COMPANY, a Corporation.

Answer.

And now, February 28, 1906, comes the President, Managers and Company of the Monongahela Bridge Company, a corporation duly organized and existing under the laws of the State of Pennsylvania,

and having its principal place of business in the Borough of Brownsville, County of Fayette, in said State, and says that the information in manner and form suggested should not be allowed for the following reasons:

First. That Section 18 of the Act of Congress, approved March 3, 1899, under which the Secretary of War directed the respondent to make certain alterations of its bridge at Brownsville, in the County of Fayette and State of Pennsylvania, is unconstitutional and void for the following reasons:

(*a*) That said Act, or the section thereof above mentioned, is in violation of the Fifth Amendment to the Constitution of the United States.

(*b*) That said Act, or the section thereof above mentioned, is in violation of the Fourteenth Amendment to the Constitution of the United States.

(*c*) That said Act, or the section thereof above mentioned, is in violation of Article 1, Section 1, of the Constitution of the
4 United States.

(*d*) It does not provide any judicial inquiry as to the nature of the obstruction and, as a matter of fact, no judicial inquiry has been had.

(*e*) By its terms the United States do not provide compensation to the Bridge Company for the cost of the alterations required, and as a matter of fact do not propose to provide for or make such compensation.

Second. That the said bridge is not an unreasonable obstruction to navigation of the Monongahela River, but navigation through or under it is reasonably free, easy and unobstructed.

Third. The only offence under said Act is the failure by the Bridge Company to comply with the order of the Secretary of War requiring the reconstruction or alteration of its bridge.

Fourth. The bridge of the respondent was erected under authority of the Commonwealth of Pennsylvania in the year 1833, by an Act of the General Assembly of said Commonwealth entitled "An Act to authorize the Governor to incorporate a company to erect a bridge over the Monongahela River," approved March 16, A. D. 1830, at a cost of upward of $65,000, many years before Congress of the United States had assumed or exercised any jurisdiction over the Monongahela River, and at a time when the said river was only navigable for a short time during each year by small craft in times of freshet or high water; and said bridge was so located and constructed with the assent and approval of the Government of the United States as a part of the National Highway built under authority of an Act of Congress approved March 29, 1806, and entitled "An Act to regulate the laying out and making a road from Cumberland, in the State of Maryland, to the State of Ohio, and has been so used con-
5 tinuously to the present time, and Section 18 of the Act of March 3, 1899, is not applicable thereto.

PRESIDENT, MANAGERS, AND COMPANY OF THE MONONGAHELA BRIDGE COMPANY,

By GEO. W. LENHART, *President.*

STATE OF PENNSYLVANIA, *County of Allegheny, ss:*

George W. Lenhart, President of the Monongahela Bridge Company, being duly sworn according to law, deposes and says that the facts set forth in the foregoing Answer are true as he verily believes.

GEO. W. LENHART.

Sworn to and subscribed before me this 28th day of February, A. D. 1906.

WM. T. LINDSEY, *Clerk.*

6 [Endorsed:] No. 1 May Term, 1906. In the District Court of the United States for the Western District of Pennsylvania. The United States *vs.* President, Managers and Company of the Monongahela Bridge Company, a corporation. Answer. D. Filed Feb. 27, 1906. Reed, Smith, Shaw & Beal, 1027 Carnegie Bldg., Pittsburgh.

7 In the District Court of the United States for the Western District of Pennsylvania.

No. —, May Term, 1906.

THE UNITED STATES
vs.
THE PRESIDENT, MANAGERS, AND COMPANY OF THE MONONGAHELA BRIDGE COMPANY, a Corporation.

Information.

Be it remembered that John W. Dunkle, Attorney of the United States for the Western District of Pennsylvania, who for the United States in this behalf prosecutes, in his own person comes here into the District Court of the United States for said Western District of Pennsylvania, on the 14th day of February, in the year of our Lord one thousand nine hundred and six, in said term, and gives the Court here to understand and be informed that the President, Managers and Company of the Monongahela Bridge Company is a corporation existing under the laws of the State of Pennsylvania, having its principal office in the Borough of Brownsville, in the County of Fayette, in the Western District of Pennsylvania; that on the first day of September, A. D. 1905, and from thence until the thirtieth day of September, A. D. 1905, both inclusive, at and within

8 the Counties of Washington and Fayette, in the District aforesaid, and within the jurisdiction of this Court, said President, Managers and Company of the Monongahela Bridge Company owned, controlled and maintained a certain bridge commonly known and designated as the "Brownsville Bridge," across the Monongahela River between West Brownsville, in said County of Washington, and Bridgeport, in said County of Fayette, the said Monongahela River being a waterway of the United States, having its source in the State of West Virginia, and being navigable in said State of West Virginia and said Western District of Pennsylvania.

And your informant gives the Court to understand and to know that the Secretary of War of the United States, having good reason to believe that the said bridge was an unreasonable obstruction to the free navigation of said river, on account of insufficient height and length of span, gave notice to said President, Managers and Company of the Monongahela Bridge Company to so alter the said bridge as to render navigation through and under it reasonable, free, easy and unobstructed. And your informant states that the Secretary of War, before giving the said notice to alter said bridge, hereinafter particularly set forth, gave the said President, Managers and Company of the Monongahela Bridge Company reasonable opportunity to be heard touching the premises aforesaid, to wit, the said Secretary of War, before giving said notice, directed that a public hearing be held, after due notice to interested parties, relative to the proposed alteration of said bridge as set forth in the notice from the
9 Secretary of War to the President, Managers and Company of the Monongahela Bridge Company, hereinafter recited; and in pursuance of said direction of the Secretary of War, after due notice to the President, Managers and Company of the Monongahela Bridge Company, among others, such public hearing was held at Brownsville, Pennsylvania, on the 29th day of January, A. D. 1904, by Major George A. Zinn, Corps of Engineers, United States Army. Said hearing was continued at the same place, on the 30th day of March, A. D. 1904, by Captain William L. Silbert, Corps of Engineers, United States Army. At said hearing, as well as at the aforesaid continuance thereof, the said President, Managers and Company of the Monongahela Bridge Company, by its President and by Counsel, appeared and was heard relative to the proposed alteration of said "Brownsville Bridge." A report of said hearing, held on the 29th day of January, A. D. 1904, and continued on the 30th day of March, A. D. 1904, was duly forwarded to the Secretary of War, through the Chief of Engineers, United States Army. On the date said hearing was held, to wit, the 29th day of January, A. D. 1904 and continuously thereafter up to and including the 30th day of September, A. D. 1905, the President, Managers and Company of the Monongahela Bridge Company, owned and controlled said "Brownsville Bridge."

After having given said President, Managers and Company of the Monongahela Bridge Company a reasonable opportunity to be heard, as aforesaid, the Secretary of War gave said Company notice to alter said "Brownsville Bridge," a copy of said notice being as follows, to wit:

10 Form No. 6. J. A. G. O. (16612)

WAR DEPARTMENT,
WASHINGTON CITY, *August 10th*, 1904.

To The Monongahela Bridge Company, Brownsville, Pennsylvania:

Take notice that—

Whereas, The Secretary of War has good reason to believe that the bridge of the Monongahela Bridge Company across the Monon-

gahela River, at Bridge Street in the Borough of Bridgeport, Pennsylvania, and commonly known as the Brownsville Bridge is an unreasonable obstruction to the free navigation of the said Monongahela River (which is one of the navigable waterways of the United States) on account of insufficient height and length of span;

And whereas, the following alterations, which have been recommended by the Chief of Engineers, are required to render navigation under it reasonably free, easy, and unobstructed, to wit: So alter said bridge as to give a channel span of not less than 390 feet in length between the face of the right abutment as now located and the center of the pier; and that the said channel span shall give a clearance height of not less than 52 feet, above the Fourth Pool of the Monongahela River:

And whereas, To August 1, 1905 is a reasonable time in which to alter the said bridge as described above:

Now, therefore, in obedience to, and by virtue of, section eighteen of an act of the Congress of the United States entitled
11 "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," approved March 3, 1899, I, William H. Taft, Secretary of War, do hereby notify the said Monongahela Bridge Company to alter the said bridge as described above, and prescribe that said alterations shall be made and completed on or before August 1, 1905.

WM. H. TAFT,
Secretary of War.

12 And in said notice the said Secretary of War specified the changes required to be made in said bridge in order to render it not an obstruction to the navigation of said Monongahela River, the method of changing said bridge, specified by said Secretary of War, so as to render navigation through and under it reasonable, free, easy and unobstructed, being as follows:

"So alter said bridge as to give a channel span of not less than 390 feet in length between the face of the right abutment as now located and the center of the pier; and that the said channel span shall give a clearance height of not less than 52 feet above the Fourth Pool of the Monongahela River."

The said changes to said bridge, set forth by the Secretary of War in said notice to said President, Managers and Company of the Monongahela Bridge Company, had, prior to the issuance of said notice, been recommended to said Secretary of War by the Chief of Engineers of the United States Army as being required in order that the navigation under said bridge might be rendered free, easy and unobstructed.

And your informant further gives the Court to know that the said Secretary of War in and by said notice, dated August 10th, 1904, prescribed a reasonable time in which to make the changes specified, to wit, prescribed and declared that the alteration to said bridge, hereinafter particularly set forth and specified, should be completed on or before August 1, 1905. Said notice was served upon said President, Managers and Company of the Monongahela

Bridge Company in accordance with the laws of the State of Pennsylvania, on the 15th day of August, 1904, at Brownsville, aforesaid, a duplicate thereof having been personally delivered to George W. Lenhart, President of said Company.

And your informant alleges that said period included between the service of said notice on August 15, 1904, and the date on which said alteration was to be completed under aforesaid order of the Secretary of War, to wit, August 1, 1905, was full, ample and reasonable time in which to make the alteration prescribed by said Secretary of War in said order. Yet so it is that at the end of said period, to wit, on August 1, 1905, the said alteration was not made and has not since been made; but to make the same the said President, Managers and Company of the Monongahela Bridge Company have wilfully failed, and refused, to wit, for the period aforesaid, and thereby have wilfully failed and refused to comply with the said lawful order of the Secretary of War, and, during said period, although said alterations prescribed by the Secretary of War were not made, have wilfully maintained said "Brownsville Bridge" over said Monongahela River.

And it is further alleged that said President, Managers and Company of the Monongahela Bridge Company have remained in default, as aforesaid, for and during the month of September, A. D. 1905, and have wilfully failed, refused and neglected to comply with the said lawful order of the Secretary of War, contained in the notice hereinbefore set forth, by failing, refusing and neglecting, for and during said month, to make the alterations to said bridge prescribed in said notice, and during said month have wilfully failed and refused to remove said bridge over said Monongahela River, contrary to the form of the Act of Congress in such case made and provided and against the peace and dignity of the United States.

Wherefore the said Attorney of the United States, who prosecutes as aforesaid for the United States, prays the consideration of the Court here in the premises, and that due process of law may be awarded against the said President, Managers and Company of the Monongahela Bridge Company in this behalf that the said President, Managers and Company make answer to the said United States concerning the premises aforesaid.

JOHN W. DUNKLE,
U. S. Attorney, West. Dist. of Pa.

UNITED STATES OF AMERICA,
Western District of Pennsylvania, ss:

William L. Sibert, being first duly sworn, deposes and says that he is an officer of the Engineer Corps of the United States Army, and is at present located and stationed at Pittsburgh, in the Western District of Pennsylvania, and has under his supervision matters pertaining to the navigation of the Monongahela River; that he has read the foregoing information and application for process, and that the allegations therein contained are true to his personal knowledge.

WILLIAM L. SIBERT,
Major Corps of Engineers, U. S. Army.

Subscribed and sworn to before me, this 14th day of February A. D. 1906.

WM. T. LINDSEY,
Clerk U. S. District Court, W. D. of Pa.

16 [Endorsed:] In the District Court of the United States for the Western District of Pennsylvania. No. 1, May Term, 1906. The United States, *vs.* The President, Managers and Company of the Monongahela Bridge Company. Information. John W. Dunkle, U. S. Attorney. Filed April 3, 1906.

Now, November 22, 1906, the Defendant corporation by its attorneys pleads *non constat de hoc* &c.

D. T. WATSON,
J. H. BEAL,
Att'ys for the President, Managers, & Company of the Monongahela Bridge Co.

17 *Blank—General Order.*

Rule 14 (*d*). All papers must be so endorsed as to disclose the general contents thereof; and all orders, decrees and rules to show cause submitted to the court by counsel must be prepared so that when served they will of themselves be self-explanatory.

In the District Court of the United States for the Western District of Pennsylvania.

We the members of the Jury in the case of U. S. *vs.* Monongahela Bridge Co. defendant, find a verdict of guilty.

W. C. KNOX.
P. B. CARTER.
THOS. CUNNINGHAM.
ROBT. M. ULP.
EDWIN HARTLEY.
H. M. BURNETT.
C. C. KUHN.
ROBERT M. BRYAN.
GEO. W. LEWIS.
S. S. GILSON.
JOHN HAMILTON, Sr.
C. L. BLACKMORE.

18 [Endorsed:] No. 1 May Term 1906 (Criminal Docket) United States District Court, Western District of Pennsylvania. United States *vs.* The President, Managers & Co. of The Monongahela Bridge Co. Rule 14 requires indorsement of all papers. Verdict. M. D. Filed: 8.30 p. m. Nov. 24, 1906.

19 In the District Court of the United States for the Western District of Pennsylvania.

No. 1, May Term, 1906, Criminal Docket.

UNITED STATES
vs.
THE PRESIDENT, MANAGERS AND COMPANY OF THE MONONGAHELA BRIDGE COMPANY.

Motion in Arrest of Judgment.

And now, to wit, this 28th day of November, in the year 1906, comes the defendant in the above entitled case, by its counsel, and moves the Court to order and direct that judgment upon the verdict herein rendered be arrested for the following reasons:

First. The Information herein filed, as conceded by the Government, is based upon and authorized only by the 18th Section of the River and Harbor Act of Congress of the United States, approved March 3rd, 1899; and said Act of the Congress of the United States is unconstitutional, null and void, and no authority for this prosecution for the following reasons:

(*a*) In that it undertakes to take or destroy private property of the Defendant Company without due process of law.

(*b*) In that it undertakes to take the private property of the Defendant Company for public use without making just compensation therefor.

(*c*) In that the said Act attempts to unlawfully delegate to the Secretary of War of the United States and to the Chief of the Engineering Corps of the United States Army, legislative
20 powers belonging exclusively to Congress, in contravention of the Constitution of the United States.

(*d*) In that the said Act undertakes unlawfully to delegate to the Secretary of War of the United States and to the Chief of the Engineering Corps of the United States Army, judicial powers in respect to the bridge of the defendant company exclusively vested by the Constitution in the judiciary of the United States.

Second. The defendant's bridge having been lawfully erected under authority of the State of Pennsylvania prior to the time at which the United States assumed jurisdiction over the Monongahela River, the Act of March 3, 1899, did not confer any power upon the Secretary of War to make the order set out in the Information filed in this case.

Third. The verdict returned by the Jury, which is as follows:

"We the members of the Jury in the case of U. S. *vs.* Monongahela Bridge Co., defendant, find a verdict of guilty,"

is defective in that it does not find the defendant, "The President, Managers and Company of the Monongahela Bridge Company" to be guilty, nor does it state of what offense the party named is found guilty.

Fourth. That there is no sufficient evidence in the cause to support a conviction of the defendant of the charge made in the Information.

THE PRESIDENT, MANAGERS AND COMPANY
OF THE MONONGAHELA BRIDGE COMPANY,
By REED, SMITH, SHAW & BEAL,
D. T. WATSON,
Counsel.

21 [Endorsed:] No. 1, May Term, 1906. Criminal Docket. District Court for the Western District of Pennsylvania. United States, *vs.* The President, Managers and Company of the Monongahela Bridge Company. Motion in Arrest of Judgment. Presented & ordered filed. D. Filed Nov. 28, 1906.

22 In the District Court of the United States for the Western District of Pennsylvania.

No. 1, May Term, 1906, Criminal Docket.

THE UNITED STATES
vs.
THE PRESIDENT, MANAGERS AND COMPANY OF THE MONONGAHELA BRIDGE COMPANY.

Motion for New Trial.

And now, November 30, 1906, comes the defendant, The President, Managers and Company of the Monongahela Bridge Company, and moves the Court for a new trial for the following reasons:

First. The verdict is against the evidence and the weight of the evidence.

Second. The verdict is against the charge of the Court.

Third. The Court erred in refusing defendant's 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th and 13th points.

Fourth. The Court erred in affirming the Government's 1st and 3rd points.

Fifth. The Court erred in admitting the book, entitled "History of Steam Navigation," by John H. Morrison.

Sixth. The Court erred in that part of the charge in which it instructed the jury that the validity of the Act of Congress of March 3rd, 1899, and the authority of the Secretary of War thereunder to make the order in question, and the regularity of the proceedings in making said order, could not be questioned in this case, and that the order and notice of the Secretary of War were conclusive.

23 Seventh. The Court erred in that part of the charge in which the Court instructed the jury that, if the jury found that at the time of the construction of defendant's bridge the stream was actually a navigable stream for interstate purposes, or the defendant had reason to presume that it might be devoted to such purposes as it has been, then the bridge company would not be entitled to compensation and the verdict should be "guilty."

Eighth. Because the verdict returned by the jury, which is as follows:

"We the members of the jury in the case of U. S. *vs.* Monongahela Bridge Co., defendant, find a verdict of guilty,"

is defective in that it does not find the defendant, "The President, Managers and Company of the Monongahela Bridge Company" to be guilty, nor does it state of what offense the party named is found guilty.

Ninth. The Court erred in admitting in evidence Executive House Document of Commerce No. 126.

THE PRESIDENT, MANAGERS AND COMPANY
OF THE MONONGAHELA BRIDGE COMPANY,
By REED, SMITH, SHAW & BEAL,
D. T. WATSON,
Counsel.

24 [Endorsed:] No. 1 May Term, 1906. Criminal Docket. The United States *vs.* The President, Managers and Company of the Monongahela Bridge Company. Motion for New Trial. D. Filed: November 30, 1906. Wm. T. Lindsey, Clerk. Reed, Smith, Shaw & Beal, 1027 Carnegie Bldg., Pittsburgh.

25 In the District Court of the United States for the Western District of Pennsylvania.

No. 1, May Term, 1906, Criminal Docket.

THE UNITED STATES
vs.
THE PRESIDENT, MANAGERS & COMPANY OF THE MONONGAHELA BRIDGE COMPANY, a Corporation.

Order.

And now, to-wit, This 16th day of January, 1908, comes the defendant in the above cause by its counsel, Reed, Smith, Shaw & Beal and D. T. Watson, and upon motion and for good cause shown, it is hereby ordered that the time for obtaining a writ of error to the Supreme Court of the United States and an order of supersedeas in the above cause be and the same is hereby extended for the period of ten days from this date and that in the meantime no execution shall issue against the property of the defendant Company for the collection of the fine or costs of prosecution under the sentence imposed in said cause.

By the Court,

NATHANIEL EWING, *Judge.*

Attest: WM. T. LINDSEY, *Clerk.*

26 [Endorsed:] No. 1 May Term, 1906. The United States *vs.* The Pres. Managers & Company of the Monongahela Bridge Co. Order extending time for obtaining writ of error. D. Filed Jan. 16, 1908.

27 January 7, 1908.

In the District Court of the United States for the Western District of Pennsylvania.

No. 1, May Term, 1906.

UNITED STATES
v.
MONONGAHELA BRIDGE CO.

Rule for a New Trial.

D. T. Watson and James H. Beal for the rule.
John W. Dunkle, U. S. Attorney, *contra.*

ARCHBALD, *District Judge.**

This is an information, under the Act of Congress of March 3 1899 Sect. 18, 30 Stats. 1153, against the defendant company for a refusal to make the changes ordered by the Secretary of War in its bridge across the Monongahela River at Brownsville, Pennsylvania, fifty miles above the city of Pittsburg. This bridge was built in 1832, under a charter from the state of Pennsylvania, and is located on the line of the Old National Pike, laid out by the Federal Government in 1807, to give better access to the then distant parts of what is now the Middle West. It closes the gap in the road made by the river, the necessities of travel before that being met by a ferry, and after its construction the ends of the road leading to the ferry were relocated, so as to connect with the approaches to the bridge, which was thus adopted and made an integral part of the thoroughfare. It was built at a cost of from sixty-five to seventy-five thousand dollars and is still in good preservation, and if undisturbed would
28 probably last for twenty years more. It is a toll bridge and the net returns amount to about $10,000 a year, but the changes which have been ordered by the Secretary of War will compel the tearing down of the whole structure, with the loss of all that it represents, and the building of a new bridge (if the franchise is to be preserved) at an estimated additional expenditure of $112,000. There is a large and increasing use of the Monongahela by reasons of the mineral and other developments on its upper reaches, but it is effected artificially, by means of slack water navigation, secured by locks and dams, through which it is connected with the Ohio at Pittsburg and so brought in touch with the general interior system of waterways of the Ohio and Mississippi basins. At the time the bridge was built, while the river had been declared to be a navigable stream by the legislatures of both of the states through which it runs, except for flat bottom boats and rafts, and in times of high water, the navigation of it was very limited, and in dry times, according to the weight of the evidence, practically none at all. Not

* Specially assigned.

until 1836, some four years after the bridge was built and in use, was the Monongahela Navigation Company incorporated, for the purpose of improving the river by the artificial means now employed, and not until 1840 or 1841 were the first dams actually built, slack water being extended up as far as Brownsville, on the lower side of the bridge, in 1844. At the same time, even before the bridge was erected, the improvement of the Monongahela by slack water navigation was undoubtedly in contemplation, surveys to that end having been independently made by engineers of the state and of the national government. Upon this showing the jury were in-
29 structed, that the right of the Secretary of War, acting under the authority conferred upon him by Congress to require the changes which had been ordered in the bridge, even though it necessitated its entire demolition, was not open to question; but that, in view of the serious results to the company, amounting to a deprivation of it of its property, it was protected by the constitutional provision, that private property shall not be taken without just compensation being first made, which the company could demand before being required to comply, and should therefore be acquitted, unless the stream at the time the bridge was located upon it was in fact navigable, or the artificial improvement of it which has since been prosecuted, by which the changes in the structure of the bridge were made necessary, was reasonably to be apprehended; in either of which cases the company could not ask for compensation and should be found guilty. The jury having found a verdict in favor of the government, the question is as to the propriety of the instructions which were so given.

Preliminary to that, however, two points are raised which require brief consideration: 1. That the verdict as rendered is defective in form and inconclusive; and 2. That nothing was said to the jury as to the right of the defendant to the benefit of a reasonable doubt, to which it was entitled the case being a criminal one. The first of these seems to have been suggested by the recent case of the Pressed Steel Car Co. *v.* Steel Car Forge Co., 149 Fed. 182. But the two cases are very different. The difficulty there was that the jury failed to declare whether they found for the plaintiff or the defendant, simply stating that they sustained the validity of the contract sued upon and fixed the damages at a sum named. But here they
30 say, in so many words, that they "find a verdict of guilty"; as to which it is not easy to see how anything could be more positive or certain. Nor is the other matter more serious. The obvious answer to it is, that not only was there no request for an instruction as to the effect of a reasonable doubt, but that no exception was taken to the failure to give it. Had there been, it would have enabled the court to at once make the necessary correction as would have undoubtedly been done, and without that, the case being a misdemeanor, the omission must be regarded as immaterial. By the neglect to except at the time, the defendants virtually gave the court to understand, that to this extent at least the charge was satisfactory, suggesting that the stress laid upon it, now that the case has gone against them, is an afterthought, if not indeed a catching at straws.

The important questions in the case are those which were first adverted to, that is to say; whether the judgment of the Secretary of War, that the bridge in its present condition is an unreasonable obstruction to the free navigation of the river is conclusive; and whether the bridge may be condemned and the company be required to charge it, in the way specified, even to its entire destruction, without compensation for the property loss so sustained, simply because it is located upon a stream, not navigable as it is claimed, at the time the bridge was built, but having become so by artificial slack water improvements, to meet the material progress of the country.

But the first of these questions cannot be regarded as an open one, being foreclosed by the decision in the Union Bridge case
31 204 U. S. 364. It is true, that there was no offer there, as there is here, to show that the bridge was not in fact an obstruction, but the principles upon which the case proceeds are inconsistent with the reception of any such evidence. The authority of Congress over bridges upon navigable waters, as it is there shown, is derived from the power given to it by the constitution over interstate and foreign commerce, and this of necessity includes the right to determine what shall or shall not be considered unreasonably obstructive to free navigation, and to require a removal or alteration of that which is, to the extent that it is found to be so. The determination of this, as to any particular structure, might be made by direct investigation and action, as was done with regard to the bridge over the Ohio at Wheeling, which was sanctioned by Congress and made a post-road (18 How. 421) after it had been decided to be an impediment to navigation and ordered to be changed, in a suit expressly brought to determine that question. 13 How. 518. But instead of acting itself, Congress, as it is manifest, may prescribe by statute the conditions under which a bridge shall be regarded as obstructive, and commit the determination of specific cases, either to the courts, in accordance with established legal methods, or to officers of the general government, by administrative action. The latter is the course taken in the statute under discussion, in which, as it is held, Congress has not exceeded its constitutional powers. "Beyond question, if it had so elected," says Mr. Justice Harlan, in the Union Bridge Case *supra*, "Congress, in some effective mode, and without previous investigation through executive officers, could have determined for itself primarily, the fact
32 whether the bridge here in question was an unreasonable obstruction to navigation, and, if it was found to be of that character, could by direct legislation have required the defendant to make such alterations of its bridge as were requisite for the protection of navigation and commerce over the water-way in question. But investigations by Congress as to each particular bridge alleged to constitute an unreasonable obstruction to free navigation and direct legislation covering each case, separately, would be impracticable in view of the vast and varied interests which require national legislation from time to time. By the statute in question Congress declared in effect that navigation should be freed from unreasonable obstructions arising from bridges of insufficient height, width of

span, or other defects. It stopped, however, with this declaration of the general rule, and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress, as well as the duty of enforcing the rule in such cases. In performing that duty the Secretary of War will only execute the clearly expressed will of Congress, and will not in any true sense, exert legislative or judicial power." The statute being thus vindicated, the action of the Secretary of War in conformity with its provisions is necessarily conclusive and binding, the same as that of Congress, for which it is a mere substitute or alternative. And the course of procedure which is there prescribed having been followed in the present instance, the right of the defendant to question or contest it cannot be countenanced. The same as in the Union Bridge case, the subject was investigated by officers of the War Department to whom it was referred for the purpose, and after notice to the defendant and a due hearing of all parties, a
33 report was made to the Secretary of War, stating the facts, and recommending that certain specified changes in the bridge were necessary and should be required. This report was adopted by the Secretary, not perhaps in so many words, but equally effectually by the issuance of an order in conformity with its recommendations. It is true that this was done without any further hearing than that which had already been had before the officer charged with the investigation, who was to a certain extent committed to the necessity for the changes which were recommended. But while the Secretary of War might have heard the parties further, and no doubt would have accorded them that privilege if it had been asked for, he was not bound to do so in order to comply with the statute and make his action legal, nor can it be assumed that he did not give the matter independent consideration, because he did not. In the Union Bridge case, it was applied for and refused, the obstruction to navigation caused by the bridge being apparently to plain for controversy. And yet the proceedings were sustained.

It is said, however, that Congress having provided for a trial by jury upon a criminal information duly preferred, the question of whether the bridge was in fact an unreasonable obstruction cannot be withdrawn from their consideration or concluded by executive action, the right to a hearing being essential, according to the form of proceedings adopted, in order to comply with the requirement for due process of law. No doubt it would have been competent for Congress to so provide, leaving it to a jury of the district, upon a trial according to the forms of the common law, to say whether, in any given case, the situation was such as to make the bridge an obstruction, but there is nothing in the act to suggest that it was ever so intended. Should Congress undertake to investigate and
34 decide for itself whether a particular bridge was an unreasonable obstruction, it would hardly be contended, after it had passed upon the question, that it was still open, simply because the enforcement of its decision by a criminal prosecution, for a refusal to comply, was provided for. But, as pointed out above, the method given by the statute under consideration is merely an alternative. By a general enactment, Congress has delegated to the Secretary of

War the duty of investigating and determining the cases in which the conditions exist that call for action, and his decision is therefore to be treated as equally binding. A prosecution by information, and a trial by jury, are merely the means provided for enforcing his orders, it being simply left for the jury to say, whether the statute has been followed in making them, and whether there has been a wilful failure or refusal to comply, after notice, constituting the offence made punishable by the statute. Nor is it of any significance in this connection, that the *lawful* orders of the Secretary are spoken of, this being true of them, if they keep within the authority delegated to him, and are made after a reasonable opportunity to the parties interested to be heard in opposition thereto; nor, that, in order to make out the offence, the refusal to comply must be *wilful*, which means no more than that it is without just cause or excuse, as it must be after due notice and opportunity to do so. If, in addition to this, it is left to the jury to review the action of the Secretary, and to say by their verdict whether or not he was justified in his conclusions, his orders became merely persuasive or advisory, which the parties may safely disregard upon the chance of inducing a jury to believe that they are not well grounded. If that was the intention
35 of Congress it is, of course, to be recognized, but it is not to be reached by any doubtful construction, and a careful reading of the statute leaves no place for it. As is there in terms enacted the Secretary is to investigate and decide with regard to any bridge, constructed over a navigable water-way of the country, first giving the parties a reasonable opportunity to be heard, whether it is unreasonably obstructive to free navigation, on account of insufficient height, width of span, or otherwise, or whether there is difficulty in passing the draw opening or the draw span of the bridge, by rafts, steamboats, or other water craft, and thereupon, if it is, to give notice to the persons or corporation, owning or controlling such bridge, so to alter the same as to render navigation under it reasonably free, easy, and unobstructed, specifying the changes recommended by the chief of engineers that are required to be made, and prescribing a reasonable time in which to make them. All this has been observed in the case in hand, and the only alternative given by the statute is obedience, neglect or failure to comply being punishable by fine, and each month's delay being made a new offence to be similarly dealt with. There is no room to be found in any of these provisions for a reëxamination by the jury of the question of the obstructive character of the bridge, which must therefore be held to have been conclusively determined thereby.

But it is said, that the changes which are required to be made will virtually destroy the bridge, and thus deprive the defendant of its property, which cannot be done without at least making just compensation. Conceding that if located upon waters which were naturally navigable, the rights of the owners would be subject to a servitude in favor of the public which would justify such action,
36 without this: Gibson *v.* United States 166 U. S. 268, Scranton *v.* Wheeler, 179 U. S. 141. Union Bridge Co. *v.* United States 204 U. S. 364; it is contended, that the present structure was built at a day when the stream was not navigable, the changes which are

proposed to be now introduced being made necessary solely because of the artificial character of the improvements, which is a different matter. There is evidence, contravening this, that the Monongahela without regard to the slack water improvements which have been undertaken, was a navigable water within the meaning of the law; The Montello 20 Wall. 430; and that, flowing through West Virginia and Pennsylvania as it did, and connecting at Pittsburg with the vast system of waterways of the Ohio and Mississippi basins, it obviously came within the class of waters over which Congress had authority. The river was also declared navigable by the legislatures of the two states having immediate jurisdiction over it; and in the charter granted to the Bridge Co. by the state of Pennsylvania, it was expressly provided, that the erection of the bridge should not obstruct the navigation of the river so as to interfere with the passage of rafts, steamboats, or other river craft, which of itself, as pointed out in the Union Bridge case, where a similar provision appeared, was a warning to the company that the bridge must not obstruct navigation as it then was or subsequently might be. This was sufficient to justify the finding of the jury and take the case out of the constitutional provision requiring compensation to be made, assuming that the verdict was based upon it. But the jury were also instructed, that even if not in fact navigable at the time, if the company had reasonable grounds to believe that it might
37 become so, in the way it has, the incorporators would take equally subordinate to the right of public improvement which has been exercised; or in other words would be subject to the same servitude as if the stream were in fact then and there navigable. There is evidence from which this could have been found not only in the circumstances which have been alluded to, but also in the surveys which were made before the bridge was built by the engineers of both the state and the national governments, looking to the slack water improvements which have since been carried through. And as the verdict, under the charge of the court, may have been predicated upon this view it becomes necessary to consider how far the company was affected by this character of notice.

It will not of course be denied, that in every enterprise, a party is charged with notice, not only of that which is immediately in view, but of that also, which according to outward and obvious indications, is to be reasonably apprehended. This is elementary law, and there is no good reason why it should not apply in a case of this kind the same as any other. It amounts to no more, than that everyone is bound to observe the situation as it is, and take subject to the consequences reasonably to be expected from that which is thus brought home to him. As already stated, where a bridge or other structure is located upon waters which are naturally navigable, except as it has been sanctioned by Congress, it is affected with all the infirmities incident to or consequent upon that position. This is not confined to conditions as they are at the time, or else Congress would not be able to provide for the future needs of the country, and would be cut down in the use of such waters, unless compensation was provided, to the condition in which nature left them
38 or in which they happened to be at the time any improvement was undertaken. This of course is not the law, the ca-

pacities having always to be considered, and anyone locating on such waters takes subject to them. But the same reason applies, with equal force, to those water-ways like the one here which, while not immediately or fully equipped for navigation, are so connected with others which are, that by improvement or otherwise they will in all likelihood be drawn into the common system, as they have been. This is not to say, that the government could run a canal through a man's farm or overflow it with water and not pay for it. United States *v.* Lynah 188 U. S. 445. This besides being an actual physical invasion would be altogether too remote an improvement to be ever anticipated and so is not analogous. But where, as here, there is merely an extension or enlargement of natural means, which according to the evidence was to be reasonably looked for, it operates as no hardship and works no wrong to hold that the parties took subject to the servitude in favor of the public, which is now asserted, in the same way and to the same extent as if the stream were openly and notoriously navigable.

Nor is it of any consequence that the navigation by which the changes required in the bridge are made necessary is in part artificial. In Chicago Burlington & Quincy R. R. *v.* Drainage Commissioners 200 U. S. 56, the creek which was utilized to drain and reclaim the farm land there involved was artificially enlarged; and yet it was held that the railroad company, at its own expense and without any provision for its reimbursement, could be required to remove from the creek the bridge and culvert which it had placed there,

39 although it was sufficient, according to the depth and width of the channel at the time, and (unless it abandoned the crossing) to erect and maintain a new bridge which would conform to the regulations established by the drainage commissioners. Here was an entirely new distinct and artificial use, the only thing to be said in defense of it being that it was a related one, and yet the structure was required to be removed without compensation having been provided for it. Nor is it of any consequence that the case arose under the state and not the Federal law, there being no difference in principle. Similarly also, although not so closely in point, in West Chicago Street Railway *v.* Chicago 201 U. S. 506, a street railway which had lawfully constructed a tunnel under the Chicago river was required at its own cost and expense to lower the tunnel so as to provide a new and additional depth in the river which had been ascertained by competent local and Federal authority to be necessary to meet the increased demands of navigation. In every such instance, as pointed out above, the structure involved of necessity, from its character and location, is subject to a servitude in favor of the public which may be asserted by the proper governmental authority acting for the common good. Property so conditioned, and affected with such an inherent uniformity, has no value which can claim or call for compensation when thus lawfully appropriated.

But it is further urged that the bridge was adopted by the government as an integral part of the National Pike, the ferry crossing the river being given up and the two ends of the road relocated so as to connect with the approaches to it. By this, as it is contended,

the bridge was recognized as a lawful structure, the mails being also carried over it as a regularly established post route.

40 But the sanction that was so given, if any, proceeded not from Congress which alone had authority to legalize it, but from the executive branch of the government which had no such power. Conceding then that if Congress had acted in the premises the right to maintain the bridge could not be withdrawn without first providing compensation, there is no such result where the only adoption of the bridge was of the character thus shown.

Finding no occasion then for disturbing the verdict the rule for a new trial must be discharged and thereupon proceeding to impose the penalty prescribed by law, the sentence of the court is that the Monongahela Bridge Company, defendant, pay a fine of $1,000 to the government of the United States and pay the costs of prosecution, and that execution issue against the property of the said company to collect such fine and costs unless the same be paid within ten days.

41 [Endorsed:] No. 1, May Term 1906, Criminal Docket. United States District Court West. Dist. of Pa. No. 1 May Term, 1906. United States *v.* Monongahela Bridge Co. Opinion of the Court that the rule to show cause why a new trial should not be granted be discharged, and that defendant be sentenced to pay a fine to the United States of one thousand dollars, &c. Filed January 7, 1908.

42 In the District Court of the United States for the Western District of Pennsylvania.

No. 1, May Term, 1906.

UNITED STATES
v.
MONONGAHELA BRIDGE CO.

Now, January 7 1908, the sentence of the Court is that the President, Managers and Company of the Monongahela Bridge Co., defendant, pay a fine of $1,000 to the Government of the United States and pay the costs of prosecution, and that execution issue against the property of the said defendant to collect such fine and costs unless the same be paid within ten days.

R. W. ARCHBALD,
District Judge.

43 [Endorsed:] No. 1, May Term, 1906, Criminal Docket. United States District Court, West. Dist. of Pa. United States *v.* Monongahela Bridge Co. Sentence. N. Y. J. D. D. Filed January 7, 1908.

And now, January 8, 1907. Service of the within order accepted.
REED, SMITH, SHAW & BEAL,
Of Counsel for President, Managers & Company of the Monongahela Bridge Co.

44 In the District Court of the United States for the Western District of Pennsylvania.

No. 1, May Term, 1906, Criminal Docket.

UNITED STATES
vs.
THE PRESIDENT, MANAGERS & COMPANY OF THE MONONGAHELA BRIDGE COMPANY, a Corporation.

Petition for Writ of Error.

And now comes The President, Managers and Company of the Monongahela Bridge Company, a corporation, defendant herein, and says:

That upon the seventh day of January, 1908, in pursuance of a verdict of guilty found against the said defendant in your Honorable Court upon the 24th day of November, 1906, of a misdemeanor more particularly against it charged and set forth in the information at the above number and term, sentence to pay a fine of One Thousand ($1,000) Dollars and the costs of prosecution was imposed by your Honorable Court upon the said defendant; in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

45 Wherefore this defendant prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of and that a transcript of the record, proceedings and papers in this case duly authenticated may be sent to the Supreme Court of the United States.

And it will ever pray, etc.

JAMES H. BEAL,
R. J. DODDS,
D. T. WATSON,
Attorneys for Defendant.

46 And now, January 24th, 1908, the writ of error allowed as prayed, and the defendant is ordered to give bail during the pendency of the cause in the sum of Twenty-five hundred dollars. And it is further ordered that the said writ be a supersedeas of any execution upon the judgment herein pending these proceedings.

PER CURIAM.

47 [Endorsed:] United States District Court, Western District of Penna. No. 1, May Term, 1906, Criminal Docket. The United States *vs.* The President, Managers and Co. of the Monongahela Bridge Company. Petition for Writ of Error and Order allowing same.

48 [Endorsed:] United States District Court, Western District of Penna. No. 1, May Term, 1906, Criminal Docket. The United States *vs.* The President, Managers and Co. of the Monongahela Bridge Company. Petition for Writ of Error and Order allowing same. N. Y. D. Filed Jan'y 24, 1908.

49 In the District Court of the United States for the Western District of Pennsylvania.

No. 1, May Term, 1906, Criminal Docket.

THE UNITED STATES
vs.
THE PRESIDENT, MANAGERS & COMPANY OF THE MONONGAHELA BRIDGE COMPANY, a Corporation.

Assignment of Errors.

The defendant in this action, in connection with its petition for a writ of error, makes the following assignment of errors which it avers occurred upon trial of the cause, to-wit:

First. The court erred in that portion of its charge to the jury which is as follows:

"If you should find that it was actually a navigable stream, which could be put to the purposes of inter-state navigation, or, further than that, if that was to be reasonably apprehended by the existing conditions, then the parties who built this bridge, when they erected it where they did, took with notice and subject to such conditions and to the control that would ultimately result therefrom by Congress, under its power to control the interstate water-ways of the country.

This cause, then, really practically comes down to that—

50 to the disposition of these two questions. The first, of course, being the question whether the changes that are required upon this bridge would amount to a taking. But, if you dispose of that question in favor of the defendants, then the case depends really upon this other question—whether this was a navigable stream or water-way, or whether these parties had reason, from the conditions existing there at the time or that of which they were bound to take notice, to believe that it might be devoted to such a purpose as it now has been.

Parties who act with notice act with their eyes open. They cannot complain if the risk that they take turns against them. And it does not matter, and we cannot be turned aside by the fact, that the loss to them may be serious. We may hesitate to so declare it, or to take such action as will put them in that position. But still, if the facts compel that result, neither you nor I must hesitate to do our duty in the premises. If these parties erected their bridge upon a navigable water, or that which they had reason to believe might ultimately become such, then they took subject to the control of the General Government to declare, as the Secretary of War in this case

has done, that the use is an obstruction to the improvement that is contemplated and desired for the benefit of the people of the
51 United States. And, under those circumstances, the defendants cannot say that somebody else shall bear the brunt of it. Whatever the loss to themselves, they must comply with this order, if this condition be true; and you must pronounce them guilty on this charge."

Second. The court erred in that portion of its charge to the jury, which is as follows:

"At the same time, we have evidence that, even at that early day and before it, slack water improvement of this river had been contemplated, and that, too, not only by the State government, but by the National Government. United States engineers had, previous to this time, according to maps which were here produced and put in evidence, made a survey of this stream, looking to just such improvements as are now found upon it. We have also the fact that the lower reaches of the Monongahela River, as it approaches here to the confluence with the Allegheny and Ohio, by that very fact was brought in touch with the general navigation of the country. I do not know, at that early date, just how far up the stream there was navigation, but I imagine that from the very earliest here about Pittsburgh and down the Ohio there was such use of the river, that there were such river craft plying up and down and about here that the Monongahela at this lower part of it was already devoted to interstate navigation. And this bridge was only about
52 fifty miles off. And was it to be reasonably apprehended, under all these circumstances, that this stream, by such improvements as were so suggested, might become a highway such as it has now become?"

Third. The court erred in that portion of its charge to the jury, which is as follows:

"The authority of the Secretary of War to act as he has done in the premises cannot be questioned. Congress, by the Constitution of the United States, is given general authority over foreign and inter-state commerce, and, in that connection, has control over such water-ways of the Nation as may be drawn into inter-state commerce, or may be used for that purpose.

Provision, therefore, has been made, that when, in the judgment of the Secretary of War, there is an obstruction to such navigable waters, he, after giving notice to the parties and affording them an opportunity to be heard, may make an order requiring the removal or the change of such obstruction, specifying what changes shall be made and within what time it shall be done.

All that has been pursued in this case, and the regularity of what has been done by the Secretary of War is not now open to question. It must be accepted and complied with, unless a sufficient reason has been given in the position taken by the defendants for not complying with it."

53 *Fourth.* The court erred in that portion of its charge to the jury, which is as follows:

"By the slack water improvement of the Monongahela River ex-

tending above and below this bridge, it is now located on what has been adopted as a part of the navigable waters of the nation devoted to interstate commerce, and the bridge having been pronounced in this way, by due authority, to be an obstruction, that is the end of that matter."

Fifth. The court erred in that portion of its charge to the jury, which is as follows:

"So there is no question in this case for you to decide as to whether or not this bridge is an obstruction, or whether or not the changes shall be made by which the obstruction that it now presents shall be removed."

Sixth. The court erred in its answer to the first point submitted on behalf of the Unittd States, which point and answer are as follows:

"First. By Section 18 of the Act of March 3rd, 1899 (30 St. 1153) Congress placed on the Secretary of War the duty of determining whether or not bridges over natural waterways of the United States were obstructions to the navigation of such waterways. In case he complied with the requirements of the law in regard to a hearing,
and fixed a reasonable time for the completion of the pre-
54 scribed alterations, his notice to alter the Monongahela
Bridge, set forth in the Information filed at above number and term, was a lawful notice, and the failure to alter said bridge in accordance with said order, or to move the said structure, if continued during the month of September, 1905, constituted the misdemeanor charged in the Information; and though the defendant originally built said Monongahela Bridge under color of authority of an Act of Assembly of the State of Pennsylvania, and even though the requirements of that Act of Assembly were strictly observed by said bridge company in constructing said bridge, such act of assembly would not constitute a valid defense to the information.

Ans. That is a correct statement of the law."

Seventh. The court erred in its answer to the third point submitted on behalf of the United States, which point and answer are as follows:

"Third. Section 18 of the Act of March 3rd, 1889, directs the Secretary of War to give the parties interest, to-wit, the bridge owners, a reasonable opportunity to be heard, prior to issuing final notice to said bridge owners, to make the alterations deemed necessary by him in order to render the bridge under consideration not an obstruction to the free navigation of the river spanned by it. Such
hearing need not be held by the Secretary of War in person;
55 and it is sufficient under the provisions of the act if the
Secretary of War had given said owners an opportunity to be heard relative to the proposed alterations before one or more of his agents or subordinates, and the testimony or statements made at said hearing have been submitted to and considered by said Secretary of War.

Ans. That is a correct statement of the law."

Eighth. The court erred in refusing to rule and instruct the jury in accordance with the request contained in the defendant's first point, namely, that:

"*First.* The authority conferred upon the Secretary of War by Section 18 of the Act of March 3, 1899, to require any bridge constructed across any navigable water of the United States, which is an unreasonable obstruction to navigation to be so altered as to render navigation reasonably free, easy and unobstructed, applies only to bridges constructed under the authority of Acts of Congress which reserved such power to Congress."

Ninth. The court erred in refusing to rule and instruct the jury in accordance with the request contained in the defendant's second point, namely, that—

"*Second.* The question whether the bridge was so constructed as unreasonably to interfere with the navigation of the river was to be determined by the requirements of navigation at the time when the bridge was erected, and was not made dependent upon the interest of future navigation, and Congress could not compel the
56 alteration of such bridge then properly constructed, at the expense of the bridge owner, and without compensation, merely because it might under the views of the Secretary of War, in the future be an unreasonable obstruction to some new and improved method of navigation."

Tenth. The court erred in refusing to rule and instruct the jury in accordance with the request contained in the defendant's third point, namely, that—

"*Third.* The Monongahela Bridge having been erected under a statute of the State of Pennsylvania, granting the Bridge Company such power, and with the acquiescence and assent of the United States Government, and prior to the Congress of the United States having assumed jurisdiction over said river, it became a lawful structure and the lawful property of the Monongahela Bridge Company, and the United States cannot deprive the Bridge Company of that property without due process of law, including compensation for the loss of the Bridge Company."

Eleventh. The court erred in refusing to rule and instruct the jury in accordance with the request contained in the defendant's fourth point, namely, that—

"*Fourth.* The requirement by the Secretary of War in his order for the reconstruction of the Monongahela Bridge, which compels the removal by the Monongahela Bridge Co. of the present
57 structure and the erection of a new one, is a virtual taking of the property of the Bridge — by the United States without due process of law, and therefore in violation of the Federal Constitution."

Twelfth. The court erred in refusing to rule and instruct the jury in accordance with the request contained in the defendant's fifth point, namely, that—

"*Fifth.* The requirement of the Secretary of War in his order compelling the reconstruction of the bridge at the expense of the Bridge Company, and without compensation to the Bridge Company, is a virtual taking of the property for public use without just compensation, and is therefore in violation of the Federal Constitution."

Thirteenth. The court erred in refusing to rule and instruct the

jury in accordance with the request contained in the defendant's sixth point, namely, that—

"*Sixth.* From the evidence in the case the Jury may find that the United States, both by its Executive and legislative Departments, invited, acquiesced in and approved of the erection of the Monongahela Bridge as it now stands, and if they so find and also find that the Government made it a part of the National highway, and it was used as such, the defendant cannot be compelled by the order of the Secretary of War to change the said bridge and alter the same at its own expense as is provided in said order, because that would be the taking of the private property of the defendant without due process of law, and without compensation."

58 *Fourteenth.* The court erred in refusing to rule and instruct the jury in accordance with the request contained in the defendant's seventh point, namely, that—

"*Seventh.* This information being based upon a non-compliance by the Monongahela Bridge Company with the order of the Secretary of War, which order it is alleged was made under the provisions of the Act of Congress approved March 3rd, 1899, cannot be maintained, because in respect to these proceedings the provisions of said Act are null and void, for the following reasons:

(*a*) It attempts to take and destroy the private property of the Monongahela Bridge Co. without due process of law, contrary to the provisions of the Constitution:

(*b*) It undertakes to authorize the taking and the destruction of private property for public use without just compensation, contrary to the provisions of the Constitution:

(*c*) It undertakes to unlawfully delegate to the Secretary of War of the United States and to the Chief of the Engineer Corps of the United States Army, both legislative and judicial powers, and this in contravention of the Constitution of the United States."

Fourteenth. The court erred in refusing to rule and instruct the jury in accordance with the request contained in the defendant's eighth point, namely, that—

59 "*Eighth.* The said Act of Congress makes it the duty of the Secretary of War to first give the party reasonable opportunity to be heard, and to give notice to the persons or corporation owning or controlling such bridge (in this case the Monongahela Bridge Company) so to alter the same as to render navigation through or under it reasonably free and unobstructed, and in giving such notice the Act requires him to specify the changes recommended by the Chief — Engineers that are required to be made, and the Secretary of War shall prescribe in each case a reasonable time in which to make such changes. Under this Act the Secretary of War was required affirmatively to give to the Monongahela Bridge Co. the owner of the bridge in controversy, an opportunity to be heard by him, the Secretary of War, on the questions whether the bridge was an unreasonable obstruction to navigation and what alterations shall be made, before he was authorized or lawfully empowered to give the notice and make the order he did to the Monongahela Bridge Company, requiring the alteration of said bridge, and it appearing affirmatively that the Secretary of War in making

the order set forth in the Information, never at any time gave the Monongahela Bridge Co. reasonable opportunity to be heard before him, or any hearing whatsoever, therefore, the said order is not a lawful one, and this prosecution must fail."

60 *Fifteenth.* The court erred in refusing to rule and instruct the jury in accordance with the request contained in the defendant's ninth point, namely, that—

"*Ninth.* That under the evidence in the case it is for the jury to determine whether the Monongahela Bridge is an unreasonable obstruction to navigation of the Monongahela River."

Sixteenth. The court erred in refusing to rule and instruct the jury in accordance with the request contained in the defendant's tenth point, namely, that—

"*Tenth.* Conceding that Congress might by direct act declare the Monongahela Bridge an unreasonable obstruction to navigation, the United States has failed to show that Congress ever has taken any such action, or has ever disapproved of the bridge as constructed."

Seventeenth. The court erred in refusing to rule and instruct the jury in accordance with the request contained in the defendant's eleventh point, namely, that—

"*Eleventh.* The evidence showing that Capt. Sibert, without affording the Monongahela Bridge Co. an opportunity to be heard, first examined and then reported that the bridge was an unreasonable obstruction to navigation and the matter was then referred back to Captain Sibert to grant the Monongahela Bridge Co. a hearing does not show such a hearing as the Act of Congress provides for, and the fact that the Bridge Company appeared before him will

61 not alter the case, as it is not shown that the Bridge Company knew the fact of his previous examination and report."

Eighteenth. The court erred in refusing to rule and instruct the jury in accordance with the request contained in the defendant's twelfth point, namely, that—

"*Twelfth.* Under all the evidence in the case their verdict must be for the defendant."

Nineteenth. The court erred in refusing to rule and instruct the jury in accordance with the request contained in the defendant's thirteenth point, namely, that—

"*Thirteenth.* The Government cannot as in this case destroy the property of the Monongahela Bridge Co. by delegating to the Secretary of War or the Chief of Engineers power to make the order which was done in this case nor, enforce the same through the Federal Courts, without giving the Bridge Company an opportunity to defend on the ground that the bridge is not an unreasonable obstruction to navigation."

Each and all of the requests contained in the foregoing thirteen points submitted by the defendant were refused by the court in these words:

"I do not find myself able to affirm any of the positions taken in the defendant's points, therefore will refuse them without reading them."

62 *Twentieth.* The Court erred in not charging the jury that the burden was on the Government to prove the guilt of the defendant beyond a reasonable doubt.

Twenty-first. The Court erred in overruling the defendant's objection to and in admitting the offer of evidence made by the Government as follows:

"Counsel for Government offer in evidence certified copy of an Act of the General Assembly of Virginia entitled 'An Act concerning the navigation of the Monongahela River and its branches,' passed January 20, 1800; the same being marked as Exhibit No. 1 of this date.

Offer objected to by counsel for defendants, first, as irrelevant, incompetent and immaterial; and second, that the Act in question does not relate to any portion of the river involved in this case.

By the COURT: What is the purpose of the offer?

Mr. DUNKLE: It is offered for the purpose of showing that the Monongahela River is an interstate navigable highway or stream.

By the COURT: It appears to me that this act may be received, for the purpose of showing simply that the upper reaches of this river, as they flow to the Pennsylvania line, were made a public highway; not necessarily that they were navigable, because that is a fact and not a matter of law. To that extent I think it would be admissible. Let an exception be noted to defendant."

Which Act is as follows:

"An Act Concerning the Navigation of the Monongahela River and Its Branches.

63 Passed January 20th, 1800.

1. Be it enacted by the General Assembly, That the Monongahela river from the south boundary line of Pennsylvania up to the confluence of the rivers of Tyger Valley and West branch, thence up the Tyger Valley river to John Nusum's mill, and up the West branch river to Edward Jackson's mill, and up Simpson's creek to Benjamin Wilson's mill, and up Elk creek to George Jackson's mill, shall be forever considered and taken as a public highway, free for navigation.

If any person or persons shall place or put any obstruction to the navigation of the said rivers or creeks, within the distance aforesaid, he or they shall, for every such offense, forfeit and pay the sum of fifty dollars for every month such obstruction shall remain therein, to be recovered in any court of record in this commonwealth, with costs, by action of debt or information, and applied one moiety to the use of the person prosecuting, and the other moiety to the justices of the court of that county where the suit shall be tried, to be by them applied towards improving the navigation of the said rivers and creeks.

2. Provided always, and be it further enacted, That the proprietor of any mill dam erected across either of the said rivers or creeks, within the aforesaid distance, shall be allowed one year from and after the passing of this act, to erect sufficient locks and slope by or through the same, for the convenient and safe passage of boats,

to be adjudged of by the court of the county wherein the lock or slope is erected. If the proprietor of any mill across either of the said rivers or creeks hereby declared to be a public highway, shall fail or neglect to make such locks and slope, and keep the same in constant repair, it shall be lawful for any person or persons to pull down and destroy such mill dam.

64 "3. This act shall commence and be in force from and after the passing thereof.

Copy.
Test:

JNO. W. WILLIAMS,
Clerk of the House of Delegates and Keeper of the Rolls of Virginia.

Twenty-second. The Court below erred in sustaining the objection to and overruling the following offer of evidence:

Counsel for defendants now offer to prove by the witness upon the stand, to be followed by other witnesses, that the bridge of the Defendants, prior to and at the time of the making of the order of the Secretary of War, and at the present time, was not and is not an unreasonable obstruction to the free navigation of the Monongahela River; and, in this connection and for this purpose, also offer to show the kind and character of the traffic upon the river for the last thirty years and at the present time, and that all of this traffic has passed under the bridge without any accident at this bridge; that the presence of the bridge does not prevent the passage under the same of all of the traffic carried upon the river, and that for more than thirty years there has been no change in the kind or character of the traffic passing under the bridge and the craft navigating the river, and that it is not necessary to make the proposed changes in the bridge for the purpose of making navigation reasonably free and unobstructed.

Which offer is objected to by counsel for the Government, as incompetent and irrelevant.

By the COURT: The objection is sustained and exception noted for defendant. I regard this question as concluded by the decision of the Secretary of War."

65 *Twenty-third.* The Court erred in overruling the objections to and admitting the following offer of the Government:

"Counsel for the Government now offer in evidence a certified copy of a petition of certain corporations and companies in and about Pittsburgh to the Secretary of War, dated April 19, 1903, on file in the office of the War Department, asking that an investigation be made of the Brownsville Bridge, crossing the Monongahela River at Brownsville, as to whether it is an obstruction to navigation, together with the endorsement thereon; this copy being marked Exhibit No. 3; this offer to be followed by evidence that the Secretary of War gave the President, Managers and Company of the Monongahela Bridge Company reasonable opportunity to be heard; and all for the purpose of showing that in all respects Section 18 of the River and Harbor Act of March 3rd, 1899, was complied with by the Secretary

of War before giving the notice to so alter the bridge as not to obstruct navigation.

Counsel for defendants object to the offer, first, as to the petition, that it neither shows nor tends to show in any respect whatever a compliance with the provision of the Act of Congress referred to:

66 Second, that the offer of the petition is an attempt to get into the case the allegations and averments of the petitioners referred to, which are irrelevant and immaterial to any issue trying in this case, and incompetent as proof;

Third, and that the so-called endorsements are not, in point of fact, endorsements, but are reports of various officers, of which the defendant had not and could not have any knowledge, and which are entirely irrelevant and incompetent to any issue in this case.

Mr. DUNKLE: We are not offering this for the purpose of showing anything else than simply that the Secretary of War complied with this 18th Section of the Act of Congress in the matter of hearing, and that in all respects the proceedings are irregular. We do not offer anything there as evidence in this case, except to show the regularity of the proceedings of the Secretary of War.

Counsel for defendant suggest that an examination of this Act shows that it did not contemplate any petition to be made from anybody.

By the COURT: It seems to me it would be admissible to show a petition duly made to the Secretary of War, upon which he acted.

67 Mr. BEAL: That would be if the petition were in any way to be the foundation of his action. But here is a paper that the Act certainly does not contemplate. And if that be true, then all that would be admissible would be the fact that there was such petition. It seems to me, that the action of the Secretary of War is just as good with as without it.

After hearing arguments on both sides of this offer, the Court said: I feel satisfied that you may show how the action of the Secretary began; that is to say, that it was based upon a petition duly presented to him and then that the other steps followed which were called for by the law. But your offer is a little large. It puts it all in at once. I don't know what you call endorsements. I will allow your petition to come in to be followed by evidence showing the acts of the Secretary with regard to it. Of course, by admitting the petition, I do not admit the truth of the allegations in the petition. I do not intend that. You simply have a petition, in general terms, that was presented to the Secretary, and he acted upon it. An exception may be noted to defendant.

Which petition is as follows:

68 "PITTSBURGH, PA., *April* 29, 1903.

Hon. Elihu Root, Secretary of War, Washington, D. C.

DEAR SIR: We, the undersigned petition to have an investigation made of the old Brownsville wooden bridge, Monongahela River, as to its obstruction to navigation and if the same is found to be an

obstruction to navigation, to have some means provided to compel it to be raised or equipped in such a way as to relieve river people from the obstruction, making the height necessary to allow free navigation.

The coal in Pools one, two, three and four below Brownsville has been practically exhausted and the Pittsburg district will, at no distant date, be forced to get its supply above Brownsville in the Fifth Pool.

The petitioners recognize how impossible it will be to build or improve Lock # 3 unless the elevation of the Brownsville Bridge be made at once.

Very respectfully yours,

DILWORTH COAL CO.
DILWORTH COAL CO.,
H. P. DILWORTH, *Pres.*
WARREN ELSEY.
CLYDE COAL CO.,
J. H. SANFORD, *G. M.*
THE PEOPLES COAL CO.,
G. W. THOMAS, *Mgr.*
CRUCIBLE STEEL CO. OF AMERICA,
FRANK B. SMITH, *President.*
PITTSBURGH STEEL CO.,
By W. H. ROWE, *President.*
PITTSBURGH DREDGING & CONSTRUCTION CO.,
JOHN F. KLEIN, *Mgr.*
VESTA COAL CO.,
B. F. JONES, JR., *President.*
AMERICAN STEEL & WIRE CO.,
J. H. PRICE, *Mgr.*

69 *Twenty-fourth.* The court below erred in overruling the objections to and in admitting the following offer of the Government:

"Counsel for defendant ask that counsel for the Government state the purpose of the offer they made just before the adjournment of yesterday afternoon.

Mr. DUNKLE: As I remember, the Court admitted the petition that was presented and offered in evidence yesterday, and the offers now are simply offers of the endorsements on this petition, which are offered together.

By the COURT: Well, the request now is that you state of record the purpose of the offer. I suppose it is to show that the proper steps have been taken under the Act to entitle this proceeding.

Mr. DUNKLE: Yes; all of said endorsements being offered for the purpose of showing that the requirements of Section 18 of the Act of March 3, 1899, had been met by the Secretary of War before
70 the "notice that the law contemplated by said Act was given the defendant, and that his action preliminary to the service of such notice was regular. This evidence to be followed by verbal evidence showing a hearing given these defendants by W. L. Sibert, by order of the Secretary of War, by the Chief of Engineers, and also

that notice from the Secretary of War was given the defendant herein to alter this bridge on or before August 1, 1903, in certain specified particulars, and that said notice has not been obeyed.

Counsel for defendant object to the offer as a whole, because it purports to show that on September 8, 1903, Captain Sibert in pursuance of a previous order from the Chief of Engineers, made to the Chief of Engineers a report wherein he found that defendant's bridge was an unreasonable obstruction to navigation, and recommended that the Company be required to make changes therein so as to give a clearance height of fifty-two feet and a channel span of four hundred feet, and that the defendant company be allowed one and one-half years in which to make these changes; that this report was, on September 12, 1903, submitted by the Chief of Engineers to the Secretary of War, with a recommendation that the papers be referred to Captain Sibert so that he might hold public hearings after due notice, as required, and as referred to below; that on September 16,
71 1903, this recommendation was approved by the Secretary of War, and on September 23, 1903, the papers were returned to Captain Sibert, who had already found that the bridge was an unreasonable obstruction to navigation, so that he might hold public hearings on that question; that on September 23, 1904, Captain Sibert returned the papers, repealing his former finding that the bridge was an unreasonable obstruction, and accompanying the same by a lengthy argument in support thereof, which argument is included as a part of the present offer; that thereafter, on July 15, 1904, the Chief of Engineers, without any further or other hearing, approved Captain Sibert's report, and recommended that notice be served on the Bridge Company in accordance therewith; that following this, on August 10, 1904, without any further hearing, or any hearing whatever, and without any showing that the papers were ever before the Secretary of War, the Secretary of War signed a printed form of order requiring the changes to be made in this bridge, the failure to make which constitute the violation complained of in the present Information.

Therefore, the offer does not show any such proceeding as was required by the Act of Congress before the owners of the bridge could be required to make the changes specified in the order of the Secretary of War, and especially the offer does not show any
72 hearing by the Secretary of War, as is required by the Act of Congress.

Defendant also specially objects to the so-called report of Captain Sibert of September 8, 1903; and also to the so-called report of Captain Sibert of July 18, 1904; and the papers therein referred to; for the reasons that the same are incompetent and irrelevant to any issue trying in this case.

After full argument, *pro* and *con*, on this offer and the objections, the Court made the following ruling:

By the Court: It must be confessed that, acquainted with the formalities observed in judicial proceedings, there are some things in this record that do not seem as regular as they might be; but the question is, whether the substance of the law has been met. And the principal thing is, whether the bridge company has had a hearing,

and whether there has been official action by the Secretary of War, in pursuance of his duties, based upon the result of that hearing. It seems to me that the Secretary of War is not obliged to be present or preside at any hearing and pass upon the facts—any preliminary hearing, that is to say; and a Court would not even be compelled to do that. It could have the testimony taken, as is frequently done, by a Commissioner, or have a hearing before a Master, or, in
73 some cases, "hearings before a jury of view. All these things are familiar to us. But, as the result of those proceedings, the matter comes before the Court and then the Court takes action, and there usually is no action until both parties have had an opportunity to be heard upon the report.

In the present instance, I see no difficulty with the fact that this matter was referred to Major Sibert to call the parties before him and take the testimony and make a report, as he did. While it is true there is a suggestion of the question whether this bridge was an unreasonable obstruction to the navigation of the river, had already been considered and reported upon adversely by Major Sibert, yet, at the same time, that question was certainly left open, and the bridge company had an opportunity to be heard then and there upon it, and to present such facts with regard to it as seemed appropriate to it.

But necessarily in that there was also involved the suggested changes, and both matters were gone into somewhat indiscriminately, because they were necessarily thrown together. It was a double question, as to whether this bridge was an obstruction, and if it was, what changes were necessary to remove the difficulty. Both
74 sides were heard; at least, both sides had an opportunity to be present and have taken down and a record made there of what they desired to present upon that subject. Then a report was made. And while there is no definite approval, that is, no definite or particular approval on the part of the Secretary of War, yet the fact that he issues a notice in accordance with the recommendations made by the report and by the Chief of Engineers, is of itself an adoption of that report and an approval and sanction of its recommendations. There we have an action definite and distinct on the part of the Secretary of War. The Bridge Company have had a hearing. The only complaint they can make really is, that that hearing began before the officer who was assigned to hear it in the beginning, and has not been continued, so as to come before the Secretary of War himself distinctly.

The Secretary of War, of course, is an administrative officer, and the general subject, as I understand it, of bridges over navigable streams is committed in a large measure to his direction and control. This matter that is here in controversy is part of that.

It is possible, if application had been made directly to the Secretary, that he would have accorded a hearing upon this. The question is, whether it was absolutely required, in order to meet the law.

75 As I said in the beginning, certain formalities in that direction come to us as they are found in ordinary legal

proceedings. For instance, it would have been natural—as it possibly would have been expected—that Major Sibert would have given notice of his report, and that an opportunity then would have been given to have a discussion of it before the Secretary. That would have been all right. At least that would have been more in course if we were dealing with judicial matters—I mean if we were dealing with something that was not connected with an administrative office. But necessarily such matters have to be disposed of with somewhat less form than before the Courts.

And it does not seem to me, therefore, that this was an essential. The Secretary of War might have accorded a hearing before himself personally upon this report, or he might have admitted it, as he did, without that. That was matter in his discretion.

The essentials of the law, then, it seems to me, are here in these proceedings—in this record that has been offered. The Bridge Company had notice, appeared, and gave in such matters as they thought were proper for consideration upon their side of the case. The report of Major Sibert was against them. The Secretary of War has accepted and adopted that report, and issued the notice called for by the statute. This seems to be sufficiently regular to be the basis of these proceedings.

76 The exceptions taken are therefore overruled and a bill sealed for the defendants."

Which endorsements are as follows:

"Chief of Engineers.

2d Indorsement.

OFFICE CHIEF OF ENGINEERS,
U. S. ARMY, *May* 5, 1903.

Respectfully referred to Capt. W. L. Sibert, Corps of Engineers, for investigation and report.

To be returned.

By Command of Brig. Gen. Gillespie:

A. MACKENZIE,
Colonel, Corps of Engineers.

3rd Indorsement.

U. S. ENGINEER OFFICE,
PITTSBURG, PA., *Sept.* 8, 1903.

Respectfully returned to the Chief of Engineers, U. S. A.

1. The Brownsville bridge crosses the Monongahela River at Brownsville, Pa. about two miles below Lock No. 5. It has a clear height of about 40 feet above the Pool formed by Dam No. 4, Monongahela river, and its channel span has a width of about 218 feet. Its clearance is less than that under any bridge between Pittsburg, Pa. and Morgantown, W. Va.

2. The standard height fixed by the War Department in all its

recently approved plans of bridges crossing the Monongahela River is not less than 51 feet above Pool.

77 3. The height of one of the packets engaged in interstate commerce between the states of Pennsylvania and West Virginia and which is forced to pass under this bridge in the transaction of its business is 36 feet to the top of the pilot house; a rise of 4 feet would prevent this packet from passing under the bridge unless the top of the pilot house were removed. This state occurs frequently.

4. The height of this bridge is such that the average of the boats engaged in interstate commerce between the states referred to above are prevented from passing under the bridge at a stage of water materially less than that which floods the walls of the locks of the Monongahela River.

5. A bridge that prevents the use of the locks owned by the Government of the United States until the same are placed out of service by means of high water is, in the opinion of this office, an unreasonable obstruction to navigation.

6. There is enclosed herewith a photograph of this bridge during a flood. The extreme floods on the Monongahela river are about four feet higher than that shown on the picture.

7. This bridge is an old covered woolen bridge constructed sometime between 1830 and 1840.

8. In the opinion of this office this bridge is one that certainly requires action under section 18, River and Harbor Act of *Harbor Act of* March 3, 1899.

9. It is therefore respectfully recommended that it be proceeded against in the manner specified under the law referred to above, both on account of insufficient height and length of span,

78 and that, in the notice for a hearing in the case of this bridge, the changes proposed to be such as to give a least clearance of 52 feet, under a channel span of 400 feet wide; the length of side spans to be determined from the developments at the hearing. It is considered that one and one-half years is a reasonable time in which to make the necessary changes in this bridge.

10. The report on this petition has been delayed on account of a location for a new Lock No. 5, Monongahela River, and examination and survey for which was ordered in the last River and Harbor bill, and it was for a long time doubtful as to whether this lock should be located above or below this bridge.

WM. L. SIBERT,
Captain, Corps of Engineers.

4th Indorsement.

OFFICE CHIEF OF ENGINEERS,
U. S. ARMY, *September* 12, 1903.

1. Respectfully returned to the Secretary of War.

2. Complaint having been made that the bridge across the Monongahela River at Brownsville, Pa., about 2 miles below Lock No. 5, was an unreasonable obstruction to navigation, the subject was re-

ferred to Capt. W. L. Sibert, Corps of Engineers, for investigation, and attention is respectfully invited to his report of the 8th instant, in 3rd indorsement hereon.

3. I recommend that the papers be returned to Captain Sibert, with instructions to hold a public hearing, after due notice to interested parties, as required by the law and the orders of the War Department.

79

G. L. GILLESPIE,
Brig. Gen., Chief of Engineers, U. S. Army.

5th Indorsement.

WAR DEPARTMENT, *Sept.* 16, 1903.

Approved as recommended by the Chief of Engineers.

ROBERT SHAW OLIVER,
Acting Secretary of War.

6th Indorsement.

OFFICE CHIEF OF ENGINEERS,
U. S. ARMY, *September* 23, 1903.

1. Respectfully returned to Captain Sibert, attention being invited to the action of the Department shown by 4th and 5th Indorsements hereon.

2. It is desired that Captain Sibert's further report shall show that the requirements of the law, and the instructions of the War Department published in General Orders Nos. 6 and 8, Headquarters, Corps of Engineers, series 1891, have been fully complied with.

To be returned.

By command of Brig. Gen. Gillespie:

H. F. HODGES,
Major, Corps of Engineers.

80

7th Indorsement.

U. S. ENGINEER OFFICE,
PITTSBURG, PA., *May* 23, 1904.

Respectfully returned to the Chief of Engineers, U. S. Army. Report is forwarded herewith.

WM. L. SIBERT,
Major, Corps of Engineers.

8th Indorsement.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
WASHINGTON, *July* 18, 1904.

1. Respectfully returned to the Secretary of War.

2. Previous action in this case will be seen by reference to 4th and 5th indorsements hereon, in accordance with which public hearings have been held, after due notice to interested parties, who have

been afforded opportunity to present their views, both orally and in writing.

3. Attention is invited to the report of May 23, 1904, by Major Sibert, in which all the pertinent questions are discussed and to the accompanying papers.

4. There are now 24 bridges across the Monongahela River below Morgantown. There are but three of these (Brownsville, Monongahela City and Redstone) with less clearance than 51 feet. Recent acts of Congress authorizing bridges across the 4th pool, require a clearance of 54 feet.

81 5. While the bridges at Monongahela City and Redstone give a less clearance than the standard set by Congress they are much less obstructive than the Brownsville bridge.

6. This is a case of obstruction and delay to existing navigation which even for brief periods may be a serious matter, meaning a possible delay in the supply of coal to the large manufacturing establishments and affecting the prompt and systematic passage of craft through the locks of the Monongahela River improvement.

7. Major Sibert states that the facts show that towboat navigation with the better class of boats actually in use is prevented for 17.7 days in the year from passing under the Brownsville bridge, which has a height of only 40.2 feet above pool, when the same could pass through the locks which Congress has provided for such navigation, and that the packets actually navigating the Monongahela River are prevented from passing under the bridge at such times for 52.1 days in the year. He therefore concludes that the bridge is an unreasonable obstruction to navigation, and recommends that the owners be required to so alter it as to give a channel span of not less than 390 feet in length between the face of the right abutment as now located and the center of the pier; and that the said channel span shall give a clearance height of not less than 52 feet above the fourth pool of the Monongahela River, the said alterations to be made and completed by August 1, 1905.

8. I concur in the views and conclusions of Major Sibert and recommend that notice be served accordingly.

A. MACKENZIE,
Brig. Gen., Chief of Engineers, U. S. Army.

82 Embraced in the same offer with the foregoing endorsements and admitted therewith was a certified copy of the report of Major Sibert to the Chief of Engineers U. S. A., with the exhibits attached thereto which is as follows:

"ENGINEER OFFICE, U. S. ARMY,
PITTSBURG, PA., P. O. BOX 1240, *May* 23, 1904.

Brig. Gen. A. Mackenzie, Chief of Engineers, U. S. Army, Washington, D. C.

GENERAL: 1. I have the honor to forward herewith all papers connected with the recent hearings held, as authorized by 5th indorsement on E. D. file 47002, in the case of the bridge crossing the Monongahela River at Brownsville, Pa.

2. This bridge, commonly known as the Brownsville Bridge, is owned by the Monongahela Bridge Company, incorporated by an Act of the Legislature, of Pennsylvania, approved March 16, 1830.

3. These hearings, at this office understands it, were held for the purpose of securing and forwarding such information as would enable the Secretary of War to decide whether or not there is *good reason to believe* that the bridge in question is an unreasonable obstruction to navigation.

4. Stripped of all unnecessary verbiage the question for determination is: *Is there good reason to believe* that a bridge that prevents the better class of towboats actually navigating the Monongahela River, the commerce of which stream is about 10,000,000
83 tons annually, from passing under it for 17.7 days per year and prevents the packets actually navigating said stream from passing under it for 52.1 days per year, all as determined by the official records kept by the United States, an unreasonable obstruction to navigation? (See letters from Mr. J. W. Arras, U. S. Asst. Engineer, in Exhibit D). The above days are days that the boats in question cannot pass under the bridge but can pass through the locks that the Government of the United States has provided for their use. Would a railroad company consider that there was good reason to believe that its traffic was unreasonably obstructed by another highway if its passenger and express business were absolutely stopped for 52.1 days per year and its freight business so stopped for 17.7 days per year, when the same could be overcome at a reasonable cost to the obstructing highway, which latter highway was the last built?

5. The bridge in question has a maximum channel span of 207 feet and a clearance of about 40.2 feet above the pool and is the lowest bridge across the Monongahela River excepting the B. & O. R. R. bridge just below Fairmont, against which latter bridge complaints have been filed and hearings are now being held. (See list of bridges giving heights above pool, Exhibit D.) . . .

Conclusion.

38. Based upon the foregoing, the essential features of which are the facts that towboat navigation with the better class of boats actually in use is prevented for 17.7 days of the year from passing under this bridge when the same could pass through the locks which Congress has provided for such navigation, and
84 that the packets actually navigating this stream are prevented from passing under this bridge at such times for 52.1 days in the year, and from the fact that Congress has specified in the two acts passed in the present year that a least clearance of 54 feet is needed for the navigation of this pool, whereas the bridge in question has only 40.2 feet, this office is of the opinion that there is good reason to believe that the bridge owned by the Monongahela Bridge Company at Brownsville, Pa., is an unreasonable obstruction to navigation, and therefore respectfully recommends that The Monongahela Bridge Company, George W. Lenhart, Presi-

dent, Brownsville, Pa., be given notice to make the following changes in its bridge crossing the Monongahela River at Brownsville, Pa., on or before August 1, 1905, to wit: That the bridge be so altered as to give a channel span of not less than 390 feet in length between the face of the right abutment as now located and the center of the pier; and that the said channel span shall give a clearance height at the left, or pier, end of not less than 52 feet, and at the right, or abutment, end of not less than 54 feet, above the fourth pool of the Monongahela River. This will permit of the construction of the bridge in accordance with plan as shown in Sheet 3, Exhibit B, submitted by the Bridge Company.

39. Exhibit A is a typewritten reproduction of the stenographic records of the oral parts of the hearings.

40. Exhibit B comprises the brief submitted by the Attorneys for the Bridge Company; also certain papers and blueprints filed in the case.

85 41. Exhibit C comprises certain papers filed in the case by the river interests.

42. Exhibit D comprises certain papers, blueprints and photograph filed by this office.

43. Exhibit E comprises copies of notices of hearings and lists of parties to whom they were mailed; copies of advertisements, each inserted for 6 days in the following newspapers: The Pittsburg Dispatch, the Pittsburg Gazette, the Pittsburg Leader and the Pittsburg Times; also notice of hearing served on the President of the Bridge Company. This notice specifies the character of the obstruction, the changes necessary to render navigation through and under the bridge reasonably free, easy and unobstructed, and a reasonable time in which to make them, also when and where the hearings will be, and contains on the first fold an affidavit of James Simons, who personally served the notice on Geo. W. Lenhart, President of the Monongahela Bridge Company, owner of the bridge in question. This exhibit shows that the law and order of the War Department were complied with.

Very respectfully, your obedient servant,

WM. L. SIBERT,
Major, Corps Engineers."

86 Embraced in the same offer and admitted as part thereof was a certified copy of the notice of William H. Taft, Secretary of War, to the Monongahela Bridge Company, which is as follows:

"J. A. G. O.
(16612).

WAR DEPARTMENT,
WASHINGTON CITY, *August* 10, 1904.

To The Monongahela Bridge Company, Brownsville, Pennsylvania:

Take notice that

Whereas, the Secretary of War has good reason to believe that the bridge of the Monongahela Bridge Company across the Monon-

gahela River, at Bridge Street in the Borough of Bridgeport, Pennsylvania, and commonly known as the Brownsville Bridge is an unreasonable obstruction to the free navigation of the said Monongahela River (which is one of the navigable waterways of the United States) on account of insufficient height and length of span:

And whereas, the following alterations, which have been recommended by the Chief of Engineers, are required to render navigation under it reasonably free, easy and unobstructed, to wit: So alter said bridge as to give a channel span of not less than 390 feet in length between the face of the right abutment as now located and the center of the pier; and that the said channel span shall give a clearance height of not less than 52 feet, above the Fourth Pool of the Monongahela River:

87 And whereas, to August 1, 1905, is a reasonable time in which to alter the said bridge as described above:

Now, therefore, in obedience to, and by virtue of, section eighteen of an act of Congress of the United States entitled 'An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes,' approved March 3, 1899, I, William H. Taft, Secretary of War, do hereby notify the said Monongahela Bridge Company to alter the said bridge as described above, and prescribe that said alterations shall be made and completed on or before August 1, 1905.

WM. H. TAFT,
Secretary of War."

Endorsed.

Notice to Alter Bridge.

STATE OF PENNSYLVANIA, *County of Allegheny, ss:*

Wm. L. Sibert, Major Corps of Engineers, U. S. Army, being duly sworn, on his oath states that he made service of the within notice on the Monongahela Bridge Company by personally delivering a duplicate thereof to George W. Lenhart, President of said Company at Brownsville, Pennsylvania on the 15th day of August, 1904.

WM. L. SIBERT,
Major, Corps of Engineers.

Subscribed and sworn to this 15th day of August, 1904,
88 before me.

[SEAL.] WM. T. LINDSAY,
United States Commissioner,
Western District of Pennsylvania.

Term expires June 15, 1905.

Office of the Secretary, War Department.

4223

30

Apr. 24, 1906.

89 *Twenty-fifth.* The court below erred in overruling the objections and in receiving in evidence a book entitled "History of American Steam Navigation."

"Counsel for the Government now offer in evidence the book entitled "History of American Steam Navigation," for the purpose of showing that steam boats were a practical utility before this bridge was built, and that any one building a bridge across a navigable water of the United States should take notice of this improved style of navigation; and furthermore to show the kind of boat navigation on the Monongahela River prior to and at the time of the construction of this bridge; and propose to read page 19 and subsequent pages, giving a history of steamboat navigation in 1806, referring to the first steamboat built by Robert Fulton; and also page 204, where reference is made to a building of a boat at Bridgeport, Pennsylvania.

Counsel for defendant object to the offer:

First, as irrelevant and immaterial.

Second, as incompetent, the book not being properly proven and the evidence showing that, so far as the witness knows, this may be the only copy in existence outside of those in the possession of the publishers;

90 "Third, that the book was only published in 1903, probably after Captain Sibert's original report condemning this bridge.

By the COURT: Well, we already have something about this boat built at Bridgeport in the testimony of Mr. Lenhart, who said that his father built the boat. I think I will admit this and seal a bill for the defendant."

The passages read from said book were as follows (pp. 204-206-207):

"The 'Enterprise' was built at Bridgeport, on the Monongahela River, during the spring of 1814, for the New Orleans and Pittsburg route. This was a stern-wheel boat of 80 feet in length and 29 feet beam, fitted with mast and sails, as were the steamboats of this date; but during the winter of 1814 the sails and rigging were laid aside. She was owned by parties at Brownsville, Pa., and was fitted with an engine constructed by D. French, under his patent, who had built one for the 'Comet' in 1813. On her trial trip she attained a speed of three and one-half miles per hour against the current of the Monongahela River. She made two voyages to Louisville in the summer of 1814, and in December, of the same year, conveyed a cargo of ordnance stores from Pittsburg to New Orleans. . . .

91 "There was launched at Bridgeport, Pa., in the summer of 1815, the 'Despatch' owned by the 'Monongahela & Ohio Steamboat Company, the same parties who owned the 'Enterprise.' Her engine was designed and constructed by D. French of Pittsburg, Pa., and was intended for a fast boat of that day, but whether she ever fulfilled the expectations of her owners, there is no record."

Twenty-sixth. The court erred in overruling the defendant's ob-

jection to and in admitting the offer of evidence by the Government as follows:

"Counsel for the United States now offer in evidence an Act of the legislature of the State of Pennsylvania entitled 'An Act to improve the navigation of the river Monongahela,' approved April 2, 1822. . . .

Counsel for defendant object to the offer just made by counsel: First, that the evidence is not proper rebuttal evidence: Second, that it is irrelevant, if it is proposed to show that anything different was done under and in pursuance of the Act of Pennsylvania referred to; Third, that the Government can claim no rights under or by reason of any state statute in this proceeding.

Mr. DUNKLE: This is offered for the purpose of showing the improvement of the navigation of the Monongahela River by
92 the State of Pennsylvania above Brownsville bridge and before the construction of the bridge, showing, indeed, a reservation in the charter that the bridge company should not obstruct navigation; to rebut the testimony that no improvements or aids to navigation were contemplated either by the state or the nation prior to the construction of this bridge.

Mr. BEAL: The offer is further objected to, for the reason that the Act in question only provides that three gentlemen named be appointed Commissioners, who shall have the power, and it shall be their duty to cause to be removed all obstructions which impede or injure the Monongahela River, by making a slope or inclined navigation from the Virginia State line to its junction with the Monongahela River; said improvements to commence at the mouth of Dunlap's Creek, in *Allegheny* County, which is below this bridge.

By the COURT: I think this is admissible.

Note an exception for the defendant.

In reply to a suggestion made by Counsel for defendant, calling the attention of the Court to the case of Miller *vs.* Bridge Company in 125 U. S., wherein the consideration of the reservation in the state charter referred to by counsel for the Government was passed upon by the Supreme Court of the United States, the Court said:

93 The thing that is in my mind, that moves me to this ruling is this: Here is evidence that the question of the improvement of this river was being agitated before this bridge was set up; and that that bears upon the question whether a person, in locating a bridge there, could have reason to apprehend that at some time this river might be improved in this way; or, putting it, perhaps, a little more definitely, whether by its natural situation and condition, it might be presumed to be at some time a waterway of the United States. I will seal a bill for the Defendant."

Which Act is as follows (Act of 1822, P. L. 135-138):

"An Act to improve the navigation of the river Monongahela.

SECT. 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That

Solomon Kripps, and Joseph Enochs, of Fayette County, and William Leckey, of Pittsburg, be, and they are hereby appointed commissioners who shall have power, and it shall be their duty to cause to be removed all obstructions which impede or injure the navigation of said river Monongahela, by making a slope or inclined navigation from the Virginia state line, to its junction with the Allegheny river, and said improvement to commence at the mouth of
94 Dunlap's creek, in Fayette County, and for that purpose to employ suitable persons to perform said work.

SECT. 2. And be it further enacted by the authority aforesaid, That ten thousand dollars of the stock subscribed by the Governor on behalf of this commonwealth, in the stock of the Monongahela Navigation Company, be, and is hereby appropriated to defray the expenses of removing the said obstructions.

95 *Twenty-seventh.* The court erred in overruling the defendant's objection to and in admitting the offer of evidence made by the Government as follows:

"Counsel for the Government now offer in evidence the original map made by William Howard, U. S. Civil Engineer, being the same party who made the report on the improvement of the Monongahela River between Brownsville and Pittsburg, for the purpose of showing a proposed slack water system on the Monongahela River prior to the building of the bridge in question.

Offer objected to by counsel for defendant:

First. That there is no proof of the maps and plans, a bundle of which, some ten or twelve in number, are now produced;

Second. That the plans show that they only extend from Pittsburgh to Brownsville.

Third. That they show on their face that they were made in 1834, which was after this bridge was incorporated and built.

Mr. DUNKLE: If your Honor please, the survey was made, in pursuance of this report, in 1832. The maps themselves were not, perhaps, made until a little later.

96 "By the COURT: By whom do they purport to be made?

Mr. BEAL: By William Howard, U. S. Civil Engineer, by Ch. W. Angler, M. S. Ajt.; Civil Engineer John W. Smith, E. W. Robinson, by J. W. Smith.

By the COURT: From what source were they produced?

Mr. DUNKLE: These maps are part of the original files of the Engineer's office at Pittsburgh charged with the improvement of the Monongahela River. And I might explain that these maps are sent from Washington to Pittsburgh to the Engineer's office that has charge of the improvement of the Monongahela River. They are produced from among the records of the Engineer's Office.

By the COURT: I think that sufficiently establishes them, and they are admissible. Seal a bill for the defendant."

Twenty-eighth. The Court erred in overruling the defendant's objection to and in admitting the offer of evidence made by the Government as follows:

"Counsel for the Government offer in evidence Executive House Document of Commerce No. 126, to show that the Government of the

United States had contemplated the slack water improvement
97 of the Monongahela River at the time the bridge was built, which was in 1833; this being offered in connection with the Acts of Congress approved April 30, 1824.

Objected to by counsel for Defendant:

First, as incompetent; Second, as irrelevant, in that there is nothing to show that anything was ever done in pursuance of the document and all that the report recommended was that other steps be taken, and no other steps ever were taken, so far as appears; Third, as not rebuttal; and Fourth, that the Act of Congres makes no provision; it is simply a contemplation.

Mr. DUNKLE: This shows an intention on the part of Congress which was ultimately put into effect on the river, and it certainly tends to meet the evidence of defendants in this case along that same line.

Mr. BEAL: If your Honor will permit me, I would call your attention to the fact that the Act which is referred to by the Government as authority for that survey simply provides for surveys, and binds the Government in no way whatever to do anything, and there is no Government declaration that they intend to do anything, or directing anything to be done with respect to this particular river.

98 Mr. WATSON: The end of the report is that it respectfully suggests the propriety of having made additional and minute surveys on that part of the river; in other words, it is a mere step towards something else that was intended to be done, but never was done.

Mr. DUNKLE: It shows simply that Congress was investigating this matter, which would be notice to persons building bridges along the river to meet the allegation that the Bridge Company, in building this bridge, could not anticipate improvements on the river so that the river would be navigable for steamboats.

By the COURT: My idea, gentlemen, upon that subject is this: If a person or company located a bridge over a tide water creek, for instance, it would be very plain there that that was a natural navigable water, over which the Government, if it did not at the time exercise any direct authority, might at any time do so. The conditions would be such that a person so locating a bridge would have to take notice of them. On the other hand, to put an extreme case, in a bridge crossing a stream, even of some magnitude, away in the interior, there would be nothing suggested of any possibility of that kind. But between those extremes there is a debatable ground, and it is a question whether we are not on that debatable ground here. The Government has in the end found
99 occasion actually to improve this stream, and thus to bring it within the navigable waters of the United States which are subject to the direction and control of the general Government. And one question which I think the jury must pass upon is, whether when this bridge was erected, that could be reasonably apprehended; and, as bearing upon that, I think this report is admissible."

By the COURT: I will note an exception to the admission of it.

Mr. BEAL: Yes; I simply waive certification of the document.

By the COURT: Then it will be admitted.

This document was marked as Exhibit 18 of this date, and a portion of it read to the jury by counsel for the Government."

Said document was a report made to Congress by William Howard, Civil Engineer; it recommended the construction of a system of locks and dams as the most practicable method of improving navigation on the Monongahela River, and submitted a plan for the construction of eight dams and locks in the river between Pittsburgh and Brownsville.

100 *Twenty-ninth.* The Court erred in entering judgment on the verdict returned by the Jury, which is as follows:

"We the members of the jury in the case of United States *vs.* Monongahela Bridge Company, defendant, find a verdict of guilty."

which verdict is defective in that it does not find the defendant, The President, Managers and Company of the Monongahela Bridge Company to be guilty, nor does it state of what offense the party named is found guilty.

Thirtieth. The Court erred in entering judgment on the verdict and in pronouncing sentence upon the defendant as follows:

"The sentence of the court is that the Monongahela Bridge Company, defendant, pay a fine of $1000.00 to the Government of the United States, and pay the costs of prosecution, and that execution issue against the property of the said Company to collect such fine and costs unless the same be paid within ten days."

Thirty-first. There is no sufficient evidence in the cause to support a conviction of the defendant of the charge made in the information.

Wherefore the defendant prays that the judgment of the District Court may be reversed.

JAMES H. BEAL,
R. J. DODDS,
D. T. WATSON,
Attorneys for Defendant.

101 [Endorsed:] United States District Court (Western District of Penna.) No. 1, May Term, 1906, Criminal Docket. The United States *vs.* The President, Managers and Company of the Monongahela Bridge Company. Assignment of Errors. D. Filed Jan'y 24, 1908.

102 In the District Court of the United States for the Western District of Pennsylvania.

No. 1, May Term, 1906, Criminal Docket.

THE UNITED STATES
vs.
THE PRESIDENT, MANAGERS & COMPANY OF THE MONONGAHELA BRIDGE COMPANY, a Corporation.

Bond.

Know all men by these presents that we, The President, Managers and Company of the Monongahela Bridge Company, a corporation,

as principal and Levi C. Waggener, as surety, are held and firmly bound unto the United States of America in the full and just sum of Twenty-five hundred Dollars ($2,500.00 100), to be paid to the said United States of America, its certain attorney or assigns; to which payment well and truly to be made, we do bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Witness our hands and seals the 20th day of January in the year of our Lord, One Thousand Nine Hundred and Eight.

Whereas, In the District Court of the United States for the Western District of Pennsylvania at the above number and term, in pursuance of an information brought on behalf of the United
103 States a verdict of guilty was rendered against the above named The President, Managers and Company of the Monongahela Bridge Company, a corporation, and sentence imposed to pay a fine of One Thousand ($1,000) Dollars and the costs of prosecution, and the said The President, Managers and Company of the Monongahela Bridge Company has obtained a writ of error to reverse the judgment in the aforesaid proceeding.

Now the condition of this bond is, That if the said The President, Managers and Company of the Monongahela Bridge Company, a corporation, shall prosecute said writ of error to effect, and shall perform the above recited sentence and answer all damages and costs if it fail to make its plea good, and abide all further orders of the court in the above proceeding, then this obligation is to be void, otherwise to remain in full force and virtue.

THE MONONGAHELA BRIDGE CO.,
Per GEO. W. LENHART, *Pres't.* [SEAL.]
L. C. WAGGENER. [SEAL.]

Witness:
C. C. CARTER.
C. C. CARTER.

[Seal The President, Managers, & Company of the Monongahela Bridge Company. Incorporated Aug. 9, 1830.]

W. A. EDMISTON, *Sec'y.*

104 In the District Court of the United States for the Western District of Pennsylvania.

No. 1, May Term, 1906, Criminal Docket.

THE UNITED STATES
vs.
THE PRESIDENT, MANAGERS & COMPANY OF THE MONONGAHELA BRIDGE COMPANY, a Corporation.

Affidavit of Surety.

Personally before me came L. C. Waggoner, who, being duly sworn, deposes and says, that he is the owner of property situate within the jurisdiction of this court of the value of Twenty-five

Hundred ($2,500.00) Dollars, exclusive of all liabilities and exemptions.

LEVI C. WAGGENER.

Sworn to and subscribed before me this 20th day of January, 1908.

[Seal Charles C. Carter, Notary Public, Brownsville, Pa.]

CHARLES C. CARTER,
Notary Public.

My commission expires March 12, 1911.

105 [Endorsed:] United States District Court Western District of Penna. No. 1 May Term 1906 Criminal Docket. The United States *vs.* The President, Managers and Co. of The Monongahela Bridge Company. D. Bond on Appeal. And Now, January 25th, 1908, this bond approved. N. Y. Per Curiam. Filed Jan'y 25, 1908.

106 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the District Court of the United States for the Western District of Pennsylvania, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, between The United States and The President, Managers, and Company of the Monongahela Bridge Company a manifest error hath happened, to the great damage of the said The President, Managers and Company of the Monongahela Bridge Company as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 25th day of February next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court of the United States may cause further to be done to correct that error, what of right, and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 25th day of January A. D. 1908.

[Seal of U. S. District Court of W. D., Pennsylvania.]

WM. T. LINDSEY, *Clerk.*

Allowed by

——— ———.

107 [Endorsed:] No. 1 May Term, 1906 Criminal Docket The United States *vs.* The President, Managers and Company of the Monongahela Bridge Company Writ of error. Filed: Jan'y 25, 1908.

108 *Citation.*

UNITED STATES OF AMERICA,
Western District of Pennsylvania:

To J. W. Dunkle, U. S. District Attorney for the West. Dist. of Pennsylvania, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Supreme Court to be holden at Washington, on the 25 day of February next, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the Western District of Pennsylvania, wherein The President, Managers and Company of The Monongahela Bridge Co. prays to have the judgment & sentence at No. 1 May T. 1906 of the District Court of the United States for said district set aside and you are required to show cause, if any you know or have to say, why the judgment rendered against the said The President, Managers & Company of the Monongahela Bridge Company as in the said writ of error appears, should not be duly corrected and full and speedy justice done to the parties aforesaid in this behalf.

Witness my hand this 25 day of January 1908.

By the Court.

NATHANIEL EWING, *Judge.*

Attest:

—— ——, *Clerk.*

109 [Endorsed:] No. 1 May Term, 1906 Crim. Docket United States *vs.* Monongahela Bridge Co. Citation. February 18, 1908 Service of within citation accepted. John W. Dunkle U. S. Atty. Filed: Jan'y 25, 1908.

110 In the District Court of the United States for the Western District of Pennsylvania.

No. 1, May Term, 1906, Criminal Docket.

THE UNITED STATES
vs.
THE PRESIDENT, MANAGERS & COMPANY OF THE MONONGAHELA BRIDGE COMPANY, a Corporation.

Order.

And now, to wit, This 27 day of January, 1908, comes the defendant in the above cause by its counsel, Reed, Smith, Shaw & Beal and D. T. Watson, and upon motion and for a good cause shown it is

hereby ordered that the time for presenting and signing the defendants' bill of exceptions in the above entitled case, be and the same is hereby extended until the 24th day of February, 1908.

R. W. ARCHBALD,
Dist. Judge.

111 [Endorsed:] No. 1, May term, 1906. Criminal Docket. The United States *vs.* The Monongahela Bridge Company. Order extending time for presenting bill of exceptions. D. Filed January 27, 1908.

112 In the District Court of the United States for the Western District of Pennsylvania.

No. 1, May Term, 1906, Criminal Docket.

THE UNITED STATES
vs.
THE PRESIDENT, MANAGERS & COMPANY OF THE MONONGAHELA BRIDGE COMPANY, a Corporation.

Defendants' Bill of Exceptions.

113 In the District Court of the United States for the Western District of Pennsylvania.

No. 1, May Term, 1906, Criminal Docket.

THE UNITED STATES
vs.
THE PRESIDENT, MANAGERS & COMPANY OF THE MONONGAHELA BRIDGE COMPANY, a Corporation.

Defendants' Bill of Exceptions.

Be it remembered That on the 21st day of November, 1906, this cause came on for trial before the above court and a jury duly empaneled. Hon. R. W. Archbald, specially assigned, presided: Mr. John W. Dunkle, United States District Attorney, and Mr. R. M. Gibson appeared for the United States: Mr. D. T. Watson, and Messrs. James H. Beal and R. J. Dodds of the firm of Reed, Smith, Shaw & Beal, appeared for the defendant. The following proceedings were had and testimony taken:

Counsel for the Government offered in evidence a certified copy of an Act of the General Assembly of Virginia, as follows:

"An Act concerning the navigation of the Monongahela River and its branches.

Passed January 20th, 1800.

114 I. Be it enacted by the General Assembly, That the Monongahela river from the south boundary line of Pennsylvania, up to the confluence of the rivers of Tyger Valley and West

Branch, thence up the Tyger Valley river to John Nusum's mill, and up the West branch river to Edward Jackson's mill, and up Simpson's creek to Benjamin Wilson's mill, and up Elk creek to George Jackson's mill, shall be forever considered and taken as a public highway, free for navigation.

If any person or persons shall place or put any obstruction to the navigation of the said rivers or creeks within the distance aforesaid, he or they shall, for every such offence, forfeit and pay the sum of fifty dollars for every month such obstruction shall remain therein, to be recovered in any court of record in this commonwealth, with costs, by action of debt or information, and applied one moiety to the use of the person prosecuting, and the other moiety to the justices of the court of that county where the suit shall be tried, to be by them applied towards improving the navigation of the said rivers and creeks.

2. Provided, always, and be it further enacted, That the proprietor of any mill dam erected across either of the said rivers or creeks, within the aforesaid distance, shall be allowed one year from and after the passing of this act, to erect sufficient locks and slope by or through the same, for the convenient and safe passage of boats, to be adjudged of by the court of the county wherein the lock or slope is erected. If the proprietor of any mill across either of the said rivers or creeks hereby declared to be a public
115 highway, shall fail or neglect to make such locks and slope, and keep the same in constant repair, it shall be lawful for any person or persons to pull down and destroy such mill dam.

3. This act shall commence and be in force from and after the passing thereof.

Copy.

Test:

(Signed) JNO. W. WILLIAMS,
Clerk of the House of Delegates and
Keeper of the Rolls of Virginia."

Apr. 19 1906.

This offer was made for the purpose of showing that the Monongahela River is an interstate navigable highway or stream.

Counsel for defendant objected to the offer (1) as irrelevant, incompetent and immaterial; (2) because the act does not relate to any portion of the river involved in this case.

The Court ruled:

"It appears to me that this act may be received, for the purpose of showing simply that the upper reaches of this river, as they flow to the Pennsylvania line, were made a public highway; not necessarily that they were navigable, because that is a fact and not a matter of law. To that extent I think it would be admissible. Let an exception be noted to defendant."

To which ruling admitting said Act defendant duly excepted and exception was noted.

116 W. L. SIBERT, a witness called by the United States, testified as follows:

I am an officer in the Corps of Engineers of the United States Army. For nearly five years I have been located in Pittsburgh and had charge of the improvement of the Monongahela River. My knowledge of the river is limited generally to that period. The Monongahela is a navigable stream in the states of West Virginia and Pennsylvania.

"Q. What kind of craft navigate this river?

"A. The Government has, by its improvements, created a least depth of seven feet, and any boat that doesn't draw more water than that can navigate the stream. All of the ordinary boats doing business in the Monongahela River can navigate it from Fairmont, West Virginia to Pittsburgh, Pennsylvania.

"Q. What is the nature of the traffic on this river, in the volume of it, in a general way?

"A. It is composed of all of the ordinary commodities that man needs. The principal commerce, however, is coal, and the total freight tonnage of the Monongahela River is between ten and twelve million tons annually.

"Q. Are you able to state the size of the craft that navigate this stream as to height?

Objected to by counsel for defendant, as incompetent, irrelevant and immaterial.

Objection overruled and exception noted to defendant, and bill sealed.

117 "A. There are two classes of boats navigating the Monongahela River: tow boats and packet boats. The height of the tow boats varies from about twenty-four feet to thirty-two feet from the water line to the top of the pilot house; that is, assuming the chimneys and whistles down. The height of a packet boat between the same lines is from thirty to thirty-five feet, chimneys and whistles down.

"Q. State whether or not the river is navigable during all seasons of the year?

"A. It has sufficient water for navigation the entire year. There are times in the winter when it is not navigated, on account of ice, periods of two or three weeks possibly; sometimes more and sometimes less.

By the COURT:

"Q. Two or three weeks at a time?

"A. Sometimes. Although ordinarily the river is kept open in the reach that the greater portion of the coal is mined, from Lock 4 down.

"Q. All through the winter?

"A. The ice is broken up by the boats, and they make their way through it.

Mr. DUNKLE:

"Q. Are there any larger boats that navigate the Monongahela River thirty-five or forty miles from its mouth, besides the packets and tow boats that you have mentioned?

118 "A. The Ohio River boats enter the mouth of the Monongahela, and there is one excursion boat that is a little higher than the highest I have named; I can't recall its exact height; but it is a little higher than the packet boats. All of the Ohio River boats entering the harbor of Pittsburgh, or that portion of the harbor in the Monongahela River are somewhat higher than the boats I have named.

"Q. Well, do they navigate the Monongahela River?

"A. They navigate the lower end of it."

On cross-examination witness testified: A portion of the river between Morgantown and Fairmont has only been rendered navigable within the five years that I have been here. Packets and tow boats cannot now navigate as far as Fairmont, because of a railroad bridge crossing the Monongahela River two miles below Fairmont and just above Lock No. 15; they have navigated the river between Pittsburgh and Morgantown. Outside of the business done by the packets, the entire traffic on the river is done by the tow-boats and barges and consists annually of about nine million tons of coal, and one million tons or something like that which is made up of iron, sand, gravel and materials of that sort.

Brownsville, where defendant's bridge is located, is fifty-five miles from Pittsburgh. There are four locks and dams between Pittsburgh and the bridge. I cannot state even approximately what proportion of the entire annual traffic on the Monongahela River (the ten million tons) passes under defendant's bridge. Our records will give the proportion. The entire traffic does not pass Lock No. 1.

119 The towboats used on the river are of the ordinary stern-wheel type; the length of the ordinary tow-boat is about one hundred and seventy-five feet; the maximum length of one hundred and eighty feet. The barges are wooden barges, with gunwales eight or nine feet high; when loaded down, they stand about two feet out of the water. The largest barge is twenty-six feet wide and one hundred and eighty feet long. These barges carry from three hundred to one thousand tons of coal each, according to size.

There is but one line of packets running between Pittsburgh and Morgantown. I cannot state how many boats the line has in business. The line according to my last information did not make more than one trip a day from Pittsburgh to Morgantown. The packets when loaded draw about five feet; they operate only between Pittsburgh and Morgantown, a distance of about one hundred and seven miles. There are railroads on both sides of the river,—on the left side there is one running from Pittsburgh to Morgantown, and another from Pittsburgh to lock No. 7, twenty odd miles below Morgantown; on the right side there is one running from Pittsburgh to Brownsville.

The Packet Company has just been sold at receiver's sale and reorganized.

I cannot state even approximately the number of passengers or the amount of freight carried on these packets. The records in my office will show these figures; the records are kept at each lock and forwarded to my office each month, and then consolidated into a total record for the month, and kept there.

120 Counsel for the United States offered in evidence the Act of the General Assembly of Pennsylvania, entitled "An Act to authorize the Governor to incorporate a company to erect a bridge over the Monongahela River," approved March 16th, 1830. Said Act appointed commissioners

"to examine and fix on the site for the erection of a bridge over the Monongahela river, at or near where the national road crosses said river, whose duty it shall be, after being duly sworn or affirmed before some justice of the peace, faithfully to perform the duties hereby enjoined, viz., to meet at the point designated, on the first Monday of May next, or as soon thereafter as possible, to examine or establish the site for said bridge,"

and provided that after a certain number of subscriptions for stock had been received

"it shall be lawful for the Governor by letters patent under his hand and seal of the state, to erect and create the subscribers into one body politic and corporate, in deed and in law, by the name, style and title of the 'President, managers and company of the Monongahela bridge company,' and by the said name the subscribers shall have perpetual succession, and all the privileges and franchises incident to a corporation, and shall be capable of taking and holding their said capital stock and the increase and profits thereof, and of enlarging the same by new subscriptions in such manner and form as they shall think proper, if such enlargement shall be found necessary to fulfill the intent of this act, and of purchasing,

121 taking and holding to them and their successors and assigns, in fee simple or for any less estate, real and personal, as shall be found necessary and convenient to them in the prosecution of their work, and the same to sell and dispose of at their pleasure, and of doing all and every other thing which a corporation or body politic may lawfully do. . . .

SECT. 4. And be it further enacted by the authority aforesaid, That the said president and managers may make such by-laws, rules, orders and regulations, not inconsistent with the laws of this state or of the United States, as shall be necessary for the well ordering of the affairs of the corporation, and generally to have all powers, authorities and privileges necessary for completing, maintaining and keeping in repair the said bridge, and be subject to all the duties, qualifications, restrictions, penalties, fines and forfeitures, and be entitled to like tolls and profits as are given and granted to the president, managers and company for erecting a bridge over the Allegheny River, opposite to Pitt-burg, in the county of Allegheny, passed the seventeenth day of February, one thousand eight hundred and sixteen: . . . Provided further, That the erection

of said bridge shall not obstruct the navigation of said river, so as to endanger the passage of rafts, steam-boats or other water craft."

Counsel for the United States then offered in evidence a certified copy of Letters Patent to the President, Managers and Com-
122 pany of the Monongahela Bridge Company, given under the hand of the Secretary of the Commonwealth and the great seal of the State, on August 9th, 1830. Said Letters Patent recited the compliance by the commissioners with the aforesaid Act of 1830, and were to this effect:

"Know ye, That by virtue and in pursuance of the power and authority to me given in and by the said act of General Assembly, I, The said George Wolf, Governor of the said Commonwealth, Do by these Presents, which I have caused to be made patent and sealed with the State seal, create and erect the subscribers hereinbefore particularly named, into one body politic and corporate in deed and in law, by the name, style and title of the "President, Managers and Company of the Monongahela Bridge Company," and by that name to have perpetual succession, and all the privileges and franchises incident to a corporation, and to be capable of taking and holding their capital stock the increase and profits thereof, and of enlarging the same by new subscriptions, in such manner and form as they shall think proper, if such enlargement shall be found necessary to fulfil the intent of the said act and to purchase, take and hold to them, their successors and assigns, in fee simple, or for any less estate, real and personal, as shall be found necessary and convenient to them, in the prosecution of their work, and the same to sell and dispose of at their pleasure, and to do all and every other thing which a corporation or body politic may lawfully do, and generally to have, enjoy and possess all the powers, authority and privileges and be subject to all the duties, qualifications and restrictions as are given, granted and enjoined upon them, in and by the said before recited act of the General Assembly."

123 Counsel for the United States offered in evidence a certified copy of a petition to the Secretary of War in the following form:

"PITTSBURGH, PA., *April* 29, 1903.

Hon. Elihu Root, Secretary of War, Washington, D. C.

DEAR SIR: We, the undersigned petition to have an investigation made of the old Brownsville wooden bridge, Monongahela River, as to its obstruction to navigation and if the same is found to be an obstruction to navigation, to have some means provided to compel it to be raised or equipped in such a way as to relieve river people from the obstruction, making the height necessary to allow free navigation.

The coal in Pools one, two, three and four below Brownsville has been practically exhausted and the Pittsburg district will, at no distant date, be forced to get its supply above Brownsville in the Fifth Pool.

The petitioners recognize how impossible it will be to build or

improve Loc't # 3 unless the elevation of the Brownsville Bridge be made at once.

Very respectfully yours,

DILWORTH COAL CO.
DILWORTH COAL CO.,
H. P. DILWORTH, *Pres.*
WARREN ELSEY.
CLYDE COAL CO.,
J. H. SANFORD, *G. M.*
THE PEOPLES COAL CO.,
G. W. THOMAS, *Mgr.*
CRUCIBLE STEEL CO. OF AMERICA,
FRANK B. SMITH, *President.*
PITTSBURGH STEEL CO.,
By W. H. ROWE, *President.*
PITTSBURGH DREDGING & CONSTRUCTION CO.,
JOHN F. KLEIN, *Mgr.*
VESTA COAL CO.,
B. F. JONES, JR., *President.*
AMERICAN STEEL & WIRE CO.,
J. H. PRICE, *Mgr.*

124 This offer to be followed by evidence that the Secretary of War gave the President, Managers and Company of the Monongahela Bridge Company reasonable opportunity to be heard; and all for the purpose of showing that in all respects Section 18 of the River and Harbor Act of March 3rd, 1899, was complied with by the Secretary of War before giving the notice to so alter the bridge as not to obstruct navigation.

Counsel for defendants objected to the offer, first, as to the petition, that it neither shows nor tends to show in any respect whatever a compliance with the provision of the Act of Congress referred to, as the Act does not contemplate any petition to be made by anybody.

Second, that the offer of the petition was an attempt to get into the case the allegations and averments of the petitioners referred to, which are irrelevant and immaterial to any issue trying in this case, and incompetent as proof;

Third, and that the so called endorsements were not, in point of fact, endorsements, but are reports of various officers, of which the defendant had not and could not have any knowledge, and which are entirely irrelevant and incompetent to any issue in this case.

The Court ruled:

I feel satisfied that you may show how the action of the Secretary began; that is to say, that it was based upon a petition duly presented to him and then that the other steps followed which
125 were called for by the law. . . . I will allow your petition to come in to be followed by evidence showing the acts of the Secretary with regard to it. Of course, by admitting the petition, I do not admit the truth of the allegations in the petition. I do not intend that. You simply have a petition, in general terms,

that was presented to the Secretary, and he acted upon it. An exception may be noted to defendant.

To which ruling admitting said petition, defendant duly excepted and exception was noted.

Counsel for the United States then offered in evidence in a single offer certified copies of the indorsements to the aforesaid petition, and of the report of Major W. L. Sibert transmitted with the seventh endorsement and of the notice on file in the office of the War Department, signed by William H. Taft, Secretary of War and served on the President of the defendant company. The documents comprised within this offer were as follows:

The first indorsement was a reference of the aforesaid petition to the Chief of Engineers of the United States Army by the Secretary of War.

126 2nd Indorsement.

OFFICE OF CHIEF OF ENGINEERS,
U. S. ARMY, *May* 5, 1903.

Respectfully referred to Capt. W. L. Sibert, Corps of Engineers, for investigation and report.

To be returned.

By command of Brig. Gen. Gillespie:

A. MACKENZIE,
Colonel, Corps of Engineers.

3rd Indorsement.

U. S. ENGINEER OFFICE,
PITTSBURG, PA., *Sept.* 8, 1903.

Respectfully returned to the Chief of Engineers, U. S. A.

1. The Brownsville bridge crosses the Monongahela River at Brownsville, Pa. about two miles below Lock No. 5. It has a clear height of about 40 feet above the Pool formed by Dam No. 4, Monongahela river, and its channel span has a width of about 218 feet. Its clearance is less than that under any bridge between Pittsburg, Pa. and Morgantown, W. Va.

2. The standard height fixed by the War Department in all its recently approved plans of bridges crossing the Monongahela River is not less than 51 feet above Pool.

127 3. The height of one of the packets engaged in interstate commerce between the states of Pennsylvania and West Virginia and which is forced to pass under this bridge in the transaction of its business is 35 feet to the top of the pilot house; a rise of 4 feet would prevent this packet from passing under the bridge unless the top of the pilot house were removed. This state occurs frequently.

4. The height of this bridge is such that the average of the boats engaged in interstate commerce between the states referred to above are prevented from passing under the bridge at a stage of water

materially less than that which floods the walls of the locks of the Monongahela River.

5. A bridge that prevents the use of the locks owned by the Government of the United States until the same are placed out of service by means of high water is, in the opinion of this office, an unreasonable obstruction to navigation.

6. There is enclosed herewith a photograph of this bridge during a flood. The extreme floods on the Monongahela river are about four feet higher than that shown on the picture.

7. This bridge is an old covered wooden bridge constructed sometime between 1830 and 1840.

8. In the opinion of this office this bridge is one that certainly requires action under section 18, River and Harbor Act of *Harbor Act of* March 3, 1899.

9. It is therefore respectfully recommended that it be proceeded against in the manner specified under the law referred to above, both on account of insufficient height and length of span,
128 and that, in the notice for a hearing in the case of this bridge, the changes proposed to be such as to give a least clearance of 52 feet, under a channel span of 400 feet wide; the length of side spans to be determined from the developments at the hearing. It is considered that one and one-half years is a reasonable time in which to make the necessary changes in this bridge.

10. The report on this petition has been delayed on account of a location for a new Lock No. 5, Monongahela River, and examination and survey for which was ordered in the last River and Harbor bill, and it was for a long time doubtful as to whether this lock should be located above or below this bridge.

WM. L. SIBERT,
Captain, Corps of Engineers.

4th Indorsement.

OFFICE CHIEF OF ENGINEERS,
U. S. ARMY, *September* 12, 1903.

1. Respectfully returned to the Secretary of War.

2. Complaint having been made that the bridge across the Monongahela River at Brownsville, Pa., about 2 miles below Lock No. 5, was an unreasonable obstruction to navigation, the subject was referred to Capt. W. L. Sibert, Corps of Engineers, for investigation, and attention is respectfully invited to his report of the 8th instant, in 3rd indorsement hereon.

3. I recommend that the papers be returned to Captain Sibert, with instructions to hold a public hearing, after due notice to interested parties, as required by the law and the orders of the War Department.

129 G. L. GILLESPIE,
Brig. Gen., Chief of Engineers, U. S. Army.

5th Indorsement.

WAR DEPARTMENT, *Sept.* 16, 1903.

Approved as recommended by the Chief of Engineers.

ROBERT SHAW OLIVER,
Acting Secretary of War.

6th Indorsement.

OFFICE CHIEF OF ENGINEERS,
U. S. ARMY, *September* 23, 1903.

1. Respectfully returned to Captain Sibert, attention being invited to the action of the Department shown by 4th and 5th indorsements hereon.

2. It is desired that Captain Sibert's further report shall show that the requirements of the law, and the instructions of the War Department published in General Orders Nos. 6 and 8, Headquarters, Corps of Engineers, series 1891, have been fully complied with.

To be returned.

By command of Brig. Gen. Gillespie:

H. F. HODGES,
Major, Corps of Engineers.

130 7th Indorsement.

U. S. ENGINEER OFFICE,
PITTSBURG, PA., *May* 23, 1904.

Respectfully returned to the Chief of Engineers, U. S. Army. Report is forwarded herewith.

WM. L. SIBERT,
Major, Corps of Engineers.

8th Indorsement.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
WASHINGTON, *July* 18, 1904.

1. Respectfully returned to the Secretary of War.

2. Previous action in this case will be seen by reference to 4th and 5th indorsements hereon, in accordance with which public hearings have been held, after due notice to interested parties, who have been afforded opportunity to present their views, both orally and in writing.

3. Attention is invited to the report of May 23, 1904, by Major Sibert, in which all the pertinent questions are discussed, and to the accompanying papers.

4. There are now 24 bridges across the Monongahela River below Morgantown. There are but three of these (Brownsville, Monongahela City and Redstone) with less clearance than 51 feet. Recent

acts of Congress authorizing bridges across the 4th pool, require a clearance of 54 feet.

131 5. While the bridges at Monongahela City and Redstone give a less clearance than the standard set by Congress, they are much less obstructive than the Brownsville bridge.

6. This is a case of obstruction and delay to existing navigation which even for brief periods may be a serious matter, meaning a possible delay in the supply of coal to the large manufacturing establishments, and affecting the prompt and systematic passage of craft through the locks of the Monongahela River improvement.

7. Major Sibert states that the facts show that towboat navigation with the better class of boats actually in use is prevented for 17.7 days in the year from passing under the Brownsville bridge, which has a height of only 40.2 feet above pool, when the same could pass through the locks which Congress has provided for such navigation, and that the packets actually navigating the Monongahela River are prevented from passing under the bridge at such times for 52.1 days in the year. He therefore concludes that the bridge is an unreasonable obstruction to navigation, and recommends that the owners be required to so alter it as to give a channel span of not less than 390 feet in length between the face of the right abutment as now located and the center of the pier; and that the said channel span shall give a clearance height of not less than 52 feet above the fourth pool of the Monongahela River, the said alterations to be made and completed by August 1, 1905.

8. I concur in the views and conclusions of Major Sibert and recommend that notice be served accordingly.

A. MACKENZIE,
Brig. Gen., Chief of Engineers, U. S. Army.

132 Embraced in the same offer with the foregoing endorsements and admitted therewith was a certified copy of the report of Major Sibert to the Chief of Engineers U. S. A., with the exhibits attached thereto, which is as follows:

"ENGINEER OFFICE, U. S. ARMY,
PITTSBURG, PA., P. O. BOX 1240, *May* 23, 1904.

Brig. Gen. A. Mackenzie, Chief of Engineers, U. S. Army, Washington, D. C.

GENERAL: 1. I have the honor to forward herewith all papers connected with the recent hearings held, as authorized by 5th indorsement on E. D. file 47002, in the case of the bridge crossing the Monongahela River at Brownsville, Pa.

2. This bridge, commonly known as the Brownsville Bridge, is owned by the Monongahela Bridge Company, incorporated by an Act of the Legislature, of Pennsylvania, approved March 16, 1830.

3. These hearings, as this office understands it, were held for the purpose of securing and forwarding such information as would enable the Secretary of War to decide whether or not there is *good*

reason to believe that the bridge in question is an unreasonable obstruction to navigation.

4. Stripped of all unnecessary verbiage the question for determination is: *Is there good reason to believe* that a bridge that prevents the better class of towboats actually navigating the Monongahela River, the commerce of which stream is about 10,000,000 tons an-
133 nually, from passing under it for 17.7 days per year and prevents the packets actually navigating said stream from passing under it for 52.1 days per year, all as determined by the official records kept by the United States, an unreasonable obstruction to navigation? (See letter from Mr. J. W. Arras, U. S. Ass't Engineer, in Exhibit D). The above days are days that the boats in question cannot pass under the bridge but can pass through the locks that the Government of the United States has provided for their use. Would a railroad company consider that there was good reason to believe that its traffic was unreasonably obstructed by another highway if its passenger and express business were absolutely stopped for 52.1 days per year and its freight business so stopped for 17.7 day per year, when the same could be overcome at a reasonable cost to the obstructing highway, which latter highway was the last built?

5. The bridge in question has a maximum channel span of 207 feet and a clearance of about 40.2 feet above the pool and is the lowest bridge across the Monongahela River excepting the B. & O. R. R. bridge just below Fairmont, against which latter bridge complaints have been filed and hearings are now being held. (See list of bridges giving heights above pool, Exhibit D.)

6. The bridge crosses the 4th pool of the Monongahela River, across which pool Congress has recently authorized two bridges, in Acts as follows:

Act of March 3, 1901, (Public No. 179), revived and re-enacted by Act of March 14, 1904 (Public No. 51), of which section 2
134 states: "That the channel span of any bridge built under the provisions of this Act shall not be less than Fifty-four feet above the level of the water at pool full in said river, measured to the lowest part of the superstructure thereof, nor shall the said span be less than three hundred feet in length in the clear, and the piers of the bridge shall be parallel with the current of the river, and the said span shall be over the main channel of the river at ordinary water."

Act of March 14th, 1904 (Public No. 50), of which Section 2 states: "That the channel span of any bridge built under the provisions of this Act shall not be less than Fifty-four feet above the level of the water at pool full in said river, measured to the lowest part of the superstructure thereof, nor shall the said span be less than three hundred feet in length in the clear, and the piers of the bridge shall be parallel with the current of the river, and the said span shall be over the main channel of the river at ordinary water."

. . .

12. Notwithstanding the warning by the Attorneys for the Monongahela Bridge Co. to the effect that the statements of the American

Steel & Wire Co., the River Coal Co., the Dilworth Coal Co., and the Crucible Steel Co. of America, and of representatives of the Jones & Laughlin Steel Co. and others, "ought to be accepted with great caution and should carry but little weight," this office is of the opinion that the statements of the above companies and representatives are as good whether made under oath or not, and knows of no reason why any greater caution should be exercised in accepting their unsworn statements as true than in accepting
135 the sworn statements of the officers of the Monongahela Bridge Co. as true. . . .

17. The Bridge Company seems to attach much importance to the fact that its bridge "is a link in the National Pike." But the National Pike is now of no greater importance than any other country highway, and it is wholly immaterial whether the crossing of the Monongahela River at Brownsville be over the wooden bridge as it now is, or over a new structure at a higher elevation, or indeed over a new bridge at some other location.

18. This bridge does not differ from other bridges in that it was constructed under its charter from private funds contributed by its stockholders, since that is the usual method pursued by bridge companies.

19. The Bridge Company states in its brief that in order to raise the bridge and lengthen the span may mean its abandonment, that however, depending on the ability of the owners to raise so large a sum of money as will be required for reconstruction. The net income of the present structure was shown on page 5 (paragraph 11) of this report to be approximately $19,000. per annum. This amount is 9½% on the Bridge Co.'s estimate of $200,000. for rebuilding the bridge and its approaches. The ability of the owners to raise the necessary amount to construct the new bridge it is thought, can be relied upon. It is not thought, however, that the Company will rebuild this bridge at its present site but will move it downstream where approaches will be inexpensive and where an overhead crossing of the railroad could be easily effected, all
136 at a cost not to exceed $125,000. The present bridge is covered and sided up and constitutes a tunnel from which one emerges on a railroad crossing at grade. This itself is thought to be such a menace to travel as to either force a rebuilding in the near future or the entrance of some other bridge company as a competitor. This section of the country is advancing and demands better facilities. . . .

21. On page 20 of the Bridge Co.'s brief, attention is called to a certain letter submitted at a former bridge hearing as to the feasibility of constructing steamboats of less height than those now in general use, and which many years of experience have determined to be best suited to the navigation of the rivers at Pittsburg. It has long since become the universal rule for railroads to interchange cars to the farthermost limits of the land, so that a railroad car has become in the fullest sense an interstate vehicle for the transportation of freight, and has been built to best suit the purposes of its use. The adjustment of railroad crossings that unreasonably in-

terfere with the traffic of other lines is always made by lowering the under, or raising the upper tracks, or both, and never by attempting to reduce the dimensions of rolling stock. If, then, cars operated on land highways, are so thoroughly protected in their proper dimensions, etc., against unreasonable interference and obstruction, upon what grounds shall restrictions be placed upon vessels that navigate the nation's water highways, the dimensions of which vessels best suit the purposes of their use?

137 22. The particular type of vessel referred to in the letter mentioned in the Bridge Co.'s brief is the twin-screw tunnel system, of English origin and not new. And notwithstanding the fact that people from the country in which the boat was invented are investigating the present towing system on the rivers of this section with a view of substituting our system for the one in question, as evidenced by the attached clipping from the Pittsburg Gazette of May 21, 1904, and by the visit of these gentlemen to this office, the suggestion is made that in order to save a bridge company expense the navigators of this section should be forced by the Government of the United States to make an entire change in their system of transportation. The War Department on July 10, 1903, (E. D. file 44312/13) decided against not only the practicability but the propriety of the Government of the United States attempting to place any restrictions upon the appliances used by the navigation interests of this country.

"The Pittsburg Gazette, Saturday, May 21, 1904.

India River Captains Inspect Local Towboats.

Veterans of the Ganges are Studying Methods so Their Government Can Adopt Stern-Wheelers. Now on Trip Down the Ohio.

The Government of India will adopt the towing system of Pittsburg river coal operators inside of six months. This was the word handed out yesterday by Capt. A. Ainsley and Capt. V. H. Spaulding of Calcutta, India, who are now making a careful study of local navigation in order that the American methods may be inaugurated properly.

138 Capts. Ainsley and Spalding are practical rivermen. They will remain in the Pittsburg district about three months, during which time they expect to familiarize themselves with all details of local steamers and the way they handle river craft. They represent, directly, the River Steam Navigation Company of Calcutta and the India General Navigation and Railway Company, both of which are under supervision of the Government. Their trip to Pittsburg is the outcome of the visit of A. Pointon of Calcutta, who spent several days here last fall investigating local towboats. Mr. Pointon carried back the news that his country was away behind in Navigation methods, and through his recommendation the representatives were sent here.

Capt. Ainsley and Capt. Spalding stated yesterday that the towing system — use on the Ohio River and its tributaries is so much in advance of what they have been accustomed to that it amounts almost to a revelation.

'The boats in use on the Ganges and Brahmapootra rivers are side-wheelers and twin-screw steamers,' said Capt. Spalding, 'and what we need is the stern wheel boat. Its ability to handle big tows outclasses the steamers we have 10 to 1.'

'It is not commonly known,' said Capt. Ainsley, 'that we have immense deposits of coal along the rivers leading into Calcutta. We not only have the coal but our rivers are in many places five and six miles wide. We get rises there somewhat the way you do here, and the streams are navigable a good part of every year. Our
139 coal is transported principally by rail. Towing in our rivers is done at a big disadvantage. The companies organized for the transportation of coal are handicapped on account of their facilities. They have uphill work carrying on business.'

The representatives came here at an opportune time. While on the way to Pittsburgh they hoped for a good stage of water and their wishes were fulfilled. They had an opportunity to see local rivermen getting out fleets yesterday, and in order to become thoroughly instructed in the methods, they boarded the Tom Dodsworth, which left yesterday with a tow of 17 boats and 3 barges. They will stay with the boat until she gets to Cairo."

23. The crossings of commercial highways on land are either at grade or overhead. If one railroad crosses another overhead it is compelled, unless it be wholly impracticable, to provide sufficient clearance for the most modern rolling stock with a brakeman standing on top of same, notwithstanding the fact that the brakeman can readily move to a safe elevation at such overhead crossing without causing any delay or material inconvenience to the movement of traffic. The right of one railroad to cross another, either at grade or overhead, is, however, well established. Nevertheless, the tendency for several years has been decidedly in favor of preventing grade crossings wherever it is at all practicable, or where the business transacted is large. The crossing of a navigable water highway by a land highway is either at grade, that is, with a draw bridge, or an under crossing, that is, with a high fixed bridge. If a bridge be
140 neither high nor equipped with a draw span, so that boats suitable for the business transacted and in general use thereat can neither pass through nor under it at many practicable and convenient stages of water, the river highway is actually prevented from crossing the land highway, and is therefore deprived of a right which the latter highway enjoys to the exclusion of the former. Nor is the case altered by the fact that a low, small craft, not suited nor of sufficient power to properly transact the business, can pass under the land highway at certain stages of water, if the most efficient boat cannot so pass. In order to properly protect and preserve the interests of navigation in the proper use of the water highway, the requirements of craft of such proportions and efficiency as are best suited to transact the business should constitute the governing factor in es-

tablishing the limitations to be imposed by the crossing of the land highway. . . .

29. This office is of the opinion that the following should constitute the grounds upon which a conclusion should be reached as to whether or not any particular bridge unreasonably obstructs navigation: 1st. Every bridge should be so constructed as to permit the passage under it or through it, with reasonable safety, of the average sized boat actually navigating the stream, at all practicable stages of water. 2nd. Any bridge that does not permit the passage of such boat at such stages of water needlessly obstructs the use of the river highway and exists under conditions that are not reasonable, since it is impracticable to raise or lower a stream and is always
141 practicable to either build a bridge high enough and of sufficient width of span to allow the passage of such boats at such times as mentioned above or to place a draw in the bridge. 3rd. Where the topographical conditions are such that bridges can be made of such heights, without prohibitive cost, as to permit at all navigable stages of water the passage of boats best suited to the river commerce, it is for the best interests of both the land traffic and the river traffic that bridges be so constructed.

30. Congress in its general law for bridging the Muskingum River, (Act approved April 2, 1888), a river with fixed dams similar to the Monongahela River, defined as follows the way of determining the highest navigable or practicable stage:

"Sec. 3. . . . . and the lowest part of the span to be forty feet above highest navigable water, as determined by a straight line connecting the tops of the lower lock gates at the head and foot of the pool in which the bridge is to be built."

This method has been followed by this office in determining the highest navigable water in this bridge case and in all others on which it has reported. A blueprint is filed (Exhibit D) showing in profile pools 3 and 4, Monongahela River, and the heights of the lock walls. The highest navigable stages of water in those pools is determined in a manner similar to that defined by Congress. If there be placed on top of this, the highest navigable stage, a boat as high as the average packet navigating the Monongahela River, it will be seen that a clearance of 52 feet will be required under a bridge at
142 Brownsville. However, since the rebuilding of Lock 5, Monongahela River, is almost a certainty within the near future, the Engineer Department of the U. S. Army having so recommended in a survey ordered by Congress, and since such rebuilding will increase the height of the lock wall by 2 feet, this bridge should follow the rule laid down by Congress concerning other bridges in this pool and give a clearance of 54 feet instead of 52 feet as announced in the notice of the hearing. . . .

37. The Bridge Co. entered no objections to the time in which the changes to this bridge should be made.

Conclusion.

38. Based upon the foregoing, the essential features of which are the facts that towboat navigation with the better class of boats actu-

ally in use is prevented for 17.7 days of the year from passing under this bridge when the same could pass through the locks which Congress has provided for such navigation, and that the packets actually navigating this stream are prevented from passing under this bridge at such times for 52.1 days in the year, and from the fact that Congress has specified in the two acts passed in the present year that a least clearance of 54 feet is needed for the navigation of this pool, whereas the bridge in question has only 40.2 feet, this office is of the opinion that there is good reason to believe that the bridge owned by the Monongahela Bridge Company, at Brownsville, Pa., is an unreasonable obstruction to navigation, and therefore respectfully recommends that The Monongahela Bridge Company, George W.
143 Lenhart, President, Brownsville, Pa. be given notice to make the following changes in its bridge crossing the Monongahela River at Brownsville, Pa., on or before August 1, 1905, to wit: That the bridge be so altered as to give a channel span of not less than 390 feet in length between the face of the right abutment as now located and the center of the pier; and that the said channel span shall give a clearance height at the left, or pier, end of not less than 52 feet, and at the right, or abutment, end of not less than 54 feet, above the fourth pool of the Monongahela River. This will permit of the construction of the bridge in accordance with plan as shown in Sheet 3, Exhibit B, submitted by the Bridge Company.

39. Exhibit A is a typewritten reproduction of the stenographic records of the oral parts of the hearings.

40. Exhibit B comprises the brief submitted by the attorneys for the Bridge Company; also certain papers and blueprints filed in the case.

41. Exhibit C comprises certain papers filed in the case by the river interests.

42. Exhibit D comprises certain papers, blue prints and photograph filed by this office.

43. Exhibit E comprises copies of notices of hearings and lists of parties to whom they were mailed; copies of advertisements, each inserted for 6 days in the following newspapers: The Pittsburg
144 Dispatch, the Pittsburg Gazette, the Pittsburg Leader and the Pittsburg Times; also notice of hearing served on the President of the Bridge Company. This notice specifies the character of the obstruction, the changes necessary to render navigation through and under the bridge reasonably free, easy, and unobstructed, and a reasonable time in which to make them, also when and where the hearings will be, and contains on the first fold an affidavit of James Simons, who personally served the notice on Geo. W. Lenhart, President of the Monongahela Bridge Company, owner of the bridge in question. This exhibit shows that the law and orders of the War Department were complied with.

Very respectfully, your obedient servant,

WM. L. SIBERT,
Major, Corps of Engineers.

145 Embraced in the same offer and admitted as part thereof was a certified copy of the notice of William H. Taft, Secre-

tary of War, to the Monongahela Bridge Company, which is as follows:

"J. A. G. O.
(16612)

WAR DEPARTMENT,
WASHINGTON CITY, *August* 10, 1904.

To The Monongahela Bridge Company, Brownsville, Pennsylvania:

Take notice that

Whereas, The Secretary of War has good reason to believe that the bridge of the Monongahela Bridge Company across the Monongahela River, at Bridge Street in the Borough of Bridgeport, Pennsylvania, and commonly known as the Brownsville Bridge is an unreasonable obstruction to the free navigation of the said Monongahela River (which is one of the navigable waterways of the United States) on account of insufficient height and length of span;

And whereas, the following alterations, which have been recommended by the Chief of Engineers, are required to render navigation under it reasonably free, easy and unobstructed, to wit: So alter said bridge as to give a channel span of not less than 390 feet in length between the face of the right abutment as now located and the center of the pier; and that the said channel span shall give a clearance height of not less than 52 feet, above the Fourth
146 Pool of the Monongahela River; and whereas, To August 1, 1905 is a reasonable time in which to alter the said bridge as described above:

Now, therefore, in obedience to, and by virtue of, section eighteen of an act of Congress of the United States entitled 'An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes,' approved March 3, 1899, I, William H. Taft, Secretary of War, do hereby notify the said Monongahela Bridge Company to alter the said bridge as described above, and prescribe that said alterations shall be made and completed on or before August 1, 1905.

WM. H. TAFT,
Secretary of War.

Endorsed.

Notice to Alter Bridge.

STATE OF PENNSYLVANIA, *County of Allegheny, ss:*

Wm. L. Sibert, Major Corps of Engineers, U. S. Army, being duly sworn, on his oath states that he made service of the within notice on the Monongahela Bridge Company by personally delivering a duplicate thereof to George W. Lenhart, President of said Company at Brownsville, Pennsylvania on the 15th day of August, 1904.

WM. L. SIBERT,
Major, Corps of Engineers.

Subscribed and sworn to this 15th day of August, 1904,
147 before me.

[SEAL.] WM. T. LINDSAY,
United States Commissioner Western District of Pennsylvania.

Term expires June 15, 1905.

Office of the Secretary, War Department.
4223

30
Apr. 24, 1906.

This offer was for the purpose of showing that the preliminary acts required by section 18 of the Act of Congress of March 3, 1899, before the giving of the notice contemplated by said Act, had been performed by the Secretary, and to be followed by verbal evidence showing that a hearing was given the defendant company by Captain W. L. Sibert, by order of the Secretary of War, that notice to alter defendant's bridge was given the defendant company by the Secretary of War, and that such notice had not been obeyed.

Counsel for the defendant objected to the offer as a whole for the following reasons:

It purports to show that on September 8, 1903, Captain Sibert in pursuance of a previous order from the Chief of Engineers, made to the Chief of Engineers a report wherein he found that defendant's bridge was an unreasonable obstruction to navigation, and recommended that the Company be required to make changes
148 therein so as to give a clearance height of fifty-two feet and a channel span of four hundred feet, and that the defendant company be allowed one and one-half years in which to make these changes; that this report was, on September 12, 1903, submitted by the Chief of Engineers to the Secretary of War, with a recommendation that the papers be referred to Captain Sibert so that he might hold public hearings after due notice, as required, and as referred to below; that on September 16, 1903, this recommendation was approved by the Secretary of War, and on September 23, 1903, the papers were returned to Captain Sibert, who had already found that the bridge was an unreasonable obstruction to navigation, so that he might hold public hearings on that question; that on May 23, 1904, Captain Sibert returned the papers, repeating his former finding that the bridge was an unreasonable obstruction, and accompanying the same by a lengthy argument in support thereof, which argument is included as a part of the present offer; that thereafter, on July 18, 1904, the Chief of Engineers, without any further or other hearing, approved Captain Sibert's report, and recommended that notice be served on the Bridge Company in accordance therewith; that following this, on August 10, 1904, without any further hearing, or any hearing whatever, and without any showing that the papers were ever before the Secretary of War, the Secretary of War signed a printed form of order requiring the changes to be made in this bridge, the failure to make which

constitutes the violation complained of in the present Information.

149 Therefore, the offer does not show any such proceeding as was required by the Act of Congress before the owners of the bridge could be required to make the changes specified in the order of the Secretary of War, and especially the offer does not show any hearing by the Secretary of War, as is required by the Act of Congress.

Defendant also specially objects to the so-called report of Captain Sibert of September 8, 1903; and also to the so-called report of Captain Sibert of July 18, 1904; and the papers therein referred to; for the reasons that the same are incompetent and irrelevant to any issue trying in this case.

The Court overruled the defendant's objections and admitted the evidence contained in said offer supporting its ruling by the following reasons:

It must be confessed that, acquainted with the formalities observed in judicial proceedings, there are some things in this record that do not seem as regular as they might be; but the question is, whether the substance of the law has been met. And the principal thing is, whether the bridge company has had a hearing, and whether there has been official action by the Secretary of War, in pursuance of his duties, based upon the result of that hearing. It seems to me that the Secretary of War is not obliged to be present or preside at any hearing and pass upon the facts—any preliminary hearing, that is to say; and a Court would not even be compelled to do that. It could have the testimony taken, as is frequently done, by a

150 Commissioner, or have a hearing before a Master, or, in some cases, hearings before a jury of view. All these things are familiar to us. But, as the result of those proceedings, the matter comes before the Court, and then the Court takes action, and there usually is no action until both parties have had an opportunity to be heard upon the report.

In the present instance, I see no difficulty with the fact that this matter was referred to Major Sibert to call the parties before him and take the testimony and make a report, as he did. While it is true there is a suggestion that the question whether this bridge was an unreasonable obstruction to the navigation of the river had already been considered and reported upon adversely by Major Sibert, yet, at the same time, that question was certainly left open, and the bridge company had an opportunity to be heard then and there upon it, and to present such facts with regard to it as seemed appropriate to it.

But necessarily in that there was also involved the suggested changes, and both matters were gone into somewhat indiscriminately, because they were necessarily thrown together. It was a double question, as to whether this bridge was an obstruction, and if it was, what changes were necessary to remove the difficulty. Both sides were heard; at least, both sides had an opportunity to be present and have taken down and a record made thereof what they desired to present upon that subject. Then a report was made. And while

there is no definite approval, that is, no definite or particular
151 approval on the part of the Secretary of War, yet the fact that he issues a notice in accordance with the recommendations made by the report and by the Chief of Engineers, is of itself an adoption of that report and an approval and sanction of its recommendations. There we have an action definite and distinct on the part of the Secretary of War. The Bridge Company have had a hearing. The only complaint they can make really is, that that hearing began before the officer who was assigned to hear it in the beginning, and has not been continued, so as to come before the Secretary of War himself distinctly.

The Secretary of War, of course, is an administrative officer, and the general subject, as I understand it, of bridges over navigable streams is committed in a large measure to his direction and control. This matter that is here in controversy is part of that.

It is possible, if application has been made directly to the Secretary, that he would have accorded a hearing upon this. The question is, whether it was absolutely required, in order to meet the law.

As I said in the beginning, certain formalities in that direction come to us as they are found in ordinary legal proceedings. For instance, it would have been natural—as it possibly would have been expected—that Major Sibert would have given notice of his report and that an opportunity then would have been given to have a discussion of it before the Secretary. That would have been all right. At least that would have been more in course if we were dealing with judicial matters—I mean if we were dealing with something that was not connected with an administrative office. But
152 necessarily such matters have to be disposed of with somewhat less form than before the Courts. And it does not seem to me, therefore, that this was an essential. The Secretary of War might have accorded a hearing before himself personally upon this report, or he might have admitted it, as he did, without that. That was a matter in his discretion.

The essentials of the law, then, it seems to me, are here in these proceedings—in this record that has been offered. The Bridge Company had noticed, appeared, and gave in such matters as they thought were proper for consideration upon their side of the case. The report of Major Sibert was against them. The Secretary of War has accepted and adopted that report, and issued the notice called for by the statute. This seems to be sufficiently regular to be the basis of these proceedings.

The exceptions taken are therefore overruled and a bill sealed for the defendants.

To which ruling defendant duly excepted and exception was noted.

It was admitted that the foregoing notice from the Secretary of War to alter the bridge in question was served on the President, Managers and Company of the Monongahela Bridge Company on August 15th, 1904, by W. L. Sibert.

153 W. L. SIBERT, recalled as a witness by the United States, testified as follows:

The bridge of the Monongahela Bridge Company crosses the Monongahela River at a point in Pennsylvania fifty-five miles above its mouth and connects Bridgeport and West Brownsville. The changes in the bridge specified in the notice from the Secretary of War to the Monongahela Bridge Company have not been made.

By the direction of the Secretary of War I held a hearing in relation to the proposed changes in the bridge at which the President, Secretary and Treasurer, and one of the Directors and their counsel were present.

The time specified in the notice from the Secretary of War for making the changes in the bridges, was a reasonable time.

Counsel for the defendant admit that they had notice of the hearing had before Major Zimm.

On cross examination witness testified:

The length of the bridge from centre of abutment to centre of abutment is 665 feet. There are no approaches to the bridge except dirt approaches. The bridge is 40.2 feet above pool surface. The portion of the bridge between the abutment is supported by two piers which divide the space of the river into three substantially equal parts. The bridge is a highway bridge having two roadways and a walk for foot passengers between them. The bridge is a wooden covered bridge.

Brownsville immediately adjoins Bridgeport; the dividing line between them is Dunlap's creek, which is just below the
154 bridge in question. Brownsville, West Brownsville and Bridgeport are small rural towns. The development of coal has become quite a feature in the surrounding country and the people are not engaged in rural pursuits.

The old National Pike crossed the river somewhere in the vicinity of this bridge, but is no longer controlled by the Government. There is a road that leads to and from this bridge; it may be known as the old National Pike. I have no information to the contrary.

J. L. MCFEETERS, a witness called by the United States, testified that the bridge in question crosses the Monongahela River, connecting the counties of Washington and Fayette in the State of Pennsylvania.

Thereupon the United States rested.

155 Counsel for defendant then opened and offered in evidence a certified copy under the seal of the Secretary of State of the Message of President Jefferson to the Senate and House of Representatives of the United States, under date of January 31, 1807, being the message of the President transmitting to Congress the report of the Commissioners appointed to lay out the National Pike; for the purpose of showing the manner in which the defendant company was induced to build the bridge in question in this case.

Said message was as follows:

"To the Senate and House of Representatives of the United States:

In execution of the act of the last session of Congress, entitled 'An Act to regulate the laying out and making of a road from Cumberland, in the State of Maryland, to the State of Ohio,' I appointed Thomas Moore, of Maryland, Joseph Ker, of Ohio, and Eli Williams, of Maryland, Commissioners to lay out the said road, and to perform the other duties assigned to them by the act. The progress which they made in the execution of the work during the last season, will appear in their report now communicated to Congress. On receipt of it, I took measures to obtain consent for making the road of the States of Pennsylvania, Maryland and Virginia, through which the commissioners proposed to lay it out. I have received acts of the Legislatures of Maryland and Virginia, giving the consent desired; that of Pennsylvania has the subject still under consideration, as is supposed. Until I receive full consent to a free choice of route through the whole distance, I have thought
156 it safest neither to accept nor reject, finally the partial report of the commissioners.

Some matters suggested in the report belong exclusively to the Legislature.

TH. JEFFERSON.

January 31, 1807."

Counsel for defendant then offered in evidence a duly certified copy under seal of the Senate of the report of the Commissioners referred to in the aforesaid message, which report was as follows:

"The Commissioners acting by appointment under the law of Congress entitled 'An act to regulate the laying out & making a road from Cumberland in the State of Maryland to the State of Ohio,' beg leave to report to the President of the United States, . . . After a careful and critical examination of all the grounds within the limits prescribed as well as the grounds & ways out from the Ohio westwardly, at several points, & examining the shoal parts of the Ohio River as detailed in the table of soundings, stated in their journal, and after gaining all the information, geographical, general & special, possible & necessary towards a judicious discharge of the duties assigned them, the commissioners repaired to Cumberland to examine & compare their notes and journals & determine upon the direction & location of the route.

In this consultation the governing objects were,

1st. Shortness of distance between navigable points on the eastern & western waters.

157 2d. A point on the Monongahela best calculated to equalize the advantages of this portage in the country within reach of it.

3d. A point on the Ohio River most capable of combining certainty of navigation with road accommodation, embracing in this estimate remote points westwardly, as well as present & probable population on the north & south.

4th. Best mode of diffusing benefits with least distance of road. . . .

Having gained the top of Allegany mountain, or rather the top of that part called Savage, by way of Gwynn's, the general route as it respects the most important points was determined as follows, viz:

From a stone at the corner of Lot No. 1, in Cumberland near the confluence of Will's Creek & the North branch of Potomac River, thence extending along the street westwardly to cross the Hill laying between Cumberland & Gwynn's at the gap where Braddocks road passes it, thence near Gwynn's & Jesse Tomlinson's to cross the big Youghiogana near the mouth of Roger's run between the crossing of Braddock's road & the confluence of the Streams which form the Turkey-foot, thence to cross to Laurel Hill near the forks of Dunbar's run to the west foot of that hill at a point near where Braddock's old road reached it, near Guest's old place now Colo. Isaac Meason's, thence thro' Brownsville and Bridgeport to cross the Monongahela river below Josias Crawford's ferry & thence on as straight a course as the country will admit to the Ohio at a point between the mouth of Wheelen Creek & the lower part of Wheelen Island.

158 In this direction of the route it will lay about 24½ miles in Maryland, 75½ miles in Pennsylvania, & 12 miles in Virginia, distances which will be in a small degree increased by meanders which the bed of the road must necessarily make between the points mentioned in the location: & this route it is believed comprehends more important advantages than could be afforded in any other, in as much as it has a capacity at least equal to any other in extending advantages of a highway, & at the same time establishing the shortest portage between the points already navigated, and on the way accomodate other & nearer points to which navigation may be ex- & still shorten the portage.

It intersects Big Youghiogana at the nearest point from Cumberland, then lays nearly parallel with that river for the distance of twenty miles, & at the west foot of Laurel Hill lays within five miles of Connellsville, from which the Youghiogana is navigated, and in the same direction the route intersects at Brownsville the nearest point on the Monongahela River within the District. The improvement of the Youghiogana navigation is a subject of too much importance to remain long neglected; and the capacity of that river, as high up as the falls, 12 miles above Connellsville) is said to be equal, at a small expense, with the parts already navigated below. The obstructions at the falls and a rocky rapid near Turkey-foot constitute the principal impediments in that river to the intersection of the route & as much higher as the stream has a capacity for navigation, & these difficulties will doubtless be removed when the inter-

159 course shall warrant the measure. Under these circumstances the portage may be thus stated

From Cumberland to Monongahela.....	66½ miles
To a point in measure with Cornville on the Youghiogana River.	51½ miles

To a point in measure with the lower end of the falls of Youghiogana which will lay two miles north of the public road..... 43 miles
To the intersection of the route with the Youghiogana River..... 34 miles

nothing is here said of the little Youghiogana which lays nearer Cumberland, the stream being unusually crooked, its navigation can only become the work of a redundant population.

The point which this route locates, at the west foot of Laurel hill, having Cleared the whole of the Allegany Mountain, is so situated as to extend the advantages of an easy way thro' the great Carrier with most equal justice to the best parts of the country between Laurel Hill & the Ohio--lines from this point to Pittsburg & Morgantown, diverging nearly at the same Angle open upon equal terms to all parts of the western country that can make use of this portage; & which may include the settlements from Pittsburg, up big Beaver to the Connecticut reserve on Lake Erie, as well as those on the southern borders of the Ohio River, & all the intermediate Country.

Brownsville is nearly equi-distant from Big Beaver & Fishing Creeks & equally convenient to all the crossing places on the
160 Ohio between these extremes, as a port it is equal at least to any on the Monongahela within the limits, & holds superior advantages in furnishing supplies to emigrants, traders & other travellers by land or water."

Counsel for defendant then offered in evidence an Act of Congress approved March 29, 1806, 2 U. S. Statutes at Large, page 357, being the Act of Congress under which were had the proceedings referred to in the aforesaid message and report of Commissioners. Said Act is as follows:

"An Act to regulate the laying out and making a road from Cumberland, in the State of Maryland, to the State of Ohio.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States be, and he is hereby authorized to appoint, by and with the advice and consent of the Senate, three discreet
161 and disinterested citizens of the United States, to lay out a road from Cumberland, or a point on the northern bank of the river Potomac in the state of Maryland, between Cumberland and the place where the main road leading from Gwinn's to Winchester, in Virginia, crosses the river, to the state of Ohio; whose duty it shall be, as soon as may be, after their appointment, to repair to Cumberland aforesaid, and view the ground, from the points on the river Potomac hereinbefore designated, to the river Ohio; and to lay out in such direction as they shall judge, under all circumstances, the most proper a road from thence to the river Ohio, to strike the same at the most convenient place, between a point on its eastern bank, opposite to the northern boundary of Steubenville, in said State of Ohio, and the mouth of Grave Creek, which empties into the said river, a little below Wheeling, Virginia.

SEC. 2. And be it further enacted, That the aforesaid road shall be laid out four rods in width, and designated on each side by a plain and distinguishable mark on a tree, or by the erection of a stake or monument, sufficiently conspicuous, in every quarter of a mile of the distance at least, where the road pursues a straight course so far or farther, and on each side, at every point where an angle occurs in its course.

SEC. 3. And be it further enacted, That the commissioners, shall, as soon as may be, after they have laid out said road, as aforesaid, present to the President an accurate plan of the same, with its several courses and distances, accompanied by a written report of their proceedings, describing the marks and monuments by which the road is designated, and the face of country over which it passes, and
162 pointing out the particular parts, which they shall judge require the most and immediate attention and amelioration; and the probable expense of making the same passable in the most difficult parts, and through the whole distance; designating the state or states, through which said road has been laid out, and the length of the several parts which are laid out on new grounds as well as the length of those parts laid out on the road now travelled. Which report the President is hereby authorized to accept or reject, in the whole, or in part. If he accepts, he is hereby further authorized and requested to pursue such measures, as in his opinion shall be proper to obtain consent for making the road, of the state or states, through which the same has been laid out. Which consent being obtained, he is further authorized to take prompt and effectual measures to cause said road to be made through the whole distance, or in any part or parts of the same as he shall judge most conducive to the public good, having reference to the sum appropriated for the purpose.

SEC. 4. And be it further enacted, That all parts of the road which the President shall direct to be made, in case the trees are standing, shall be cleared the whole width of four rods; and the road shall be raised in the middle of the carriage way with stone, earth, or gravel and sand, or a combination of some or all of them, leaving or making, as the case may be, a ditch or water-course on each side, and
163 contiguous to said carriage way; and in no instance shall there be an elevation in said road when finished, greater than an angle of five degrees with the horizon. But the manner of making said road, in every other particular, is left to the direction of the President.

SEC. 5. And be it further enacted, That said commissioners shall each receive four dollars per day, while employed as aforesaid, in full for their compensation, including all expenses. And they are hereby authorized to employ one surveyor, two chainmen, and one marker, for whose faithfulness and accuracy, they, the said commissioners, shall be responsible, to attend them in laying out said road, who shall receive in full satisfaction for their wages, including all expenses, the surveyor three dollars per day, and each chainman and the marker, one dollar per day, while they shall be employed in said business; of which fact, a certificate signed by said commissioners shall be deemed sufficient evidence.

SEC. 6. And be it further enacted, That the sum of thirty thousand dollars be, and the same is hereby appropriated to defray the expense of laying out and making said road. And the President is hereby authorized to draw, from time to time, on the treasury, for such parts, or at any one time, for the whole of said sum, as he shall judge the service requires. Which sum of thirty thousand Dollars,
shall be paid, first, out of the fund of two per cent. reserved
164 for laying out and making roads to the state of Ohio, by virtue of the seventh section of an act passed on the thirtieth day of April, one thousand eight hundred and two, intitaled, 'An act to enable the people of the eastern division of the territory northwest of the river Ohio, to form a constitution and state government, and for the admission of such state into the Union, on an equal footing with the original states, and for other purposes.' Three per cent. of the appropriation contained in said seventh section, being directed by a subsequent law, to the laying out, opening, and making roads within the said State of Ohio. And secondly, out of any money in the treasury not otherwise appropriated, chargeable upon, and reimbursable at the treasury by said fund of two per cent. as the same shall accrue.

SEC. 7. And be it further enacted, That the President be, and he is hereby requested, to cause to be laid before Congress, as soon as convenience will permit, after the commencement of each session, a statement of the proceedings under this act, that Congress may be enabled to adopt such further measures, as may, from time to time, be proper, under existing circumstances.

Approved, March 29, 1806."

Counsel for defendant then offered in evidence an Act of the General Assembly of Pennsylvania, approved April 9, 1807, giving consent to the construction of the aforesaid road by Congress within the territorial limits of that State.

Said Act is as follows:

165 "An Act authorizing the President of the United States to open a road through that part of this state lying between Cumberland, in the state of Maryland, and the Ohio river.

Whereas by an act of Congress of the United States, passed on the twenty-ninth day of March, one thousand eight hundred and six, entitled 'An Act to regulate the laying out, and making a road from Cumberland in the state of Maryland, to the state of Ohio,' the President of the United States is empowered to lay out a road from the Potomac river, to the river Ohio, and to take measures for making the same, so soon as the consent of the legislatures of the several states through which the said road shall pass, could be obtained: And whereas, application hath been made to, this legislature, by the President of the United States, for its consent to the measures aforesaid: Therefore,

SECT. I. Be it enacted by the Senate and House of Representatives of the commonwealth of Pennsylvania, in General Assembly met,

and it is hereby enacted by the authority of the same, That the President of the United States, be, and he is hereby authorized to cause so much of the said road as will be within this state, to be opened so far as it may be necessary the same should pass through this state, and to cause the said road to be made, regulated and completed, within the limits, and according to the intent and meaning of the before recited act of Congress in relation thereto: Pro-
166 vided nevertheless, That the route laid down and reported by the commissioners, to the President of the United States, be so altered as to pass through Uniontown, in the County of Fayette, and Washington in the County of Washington, if such alteration can, in the opinion of the President, be made, consistently with the provisions of an act of Congress passed March twenty-ninth, one thousand eight hundred and six, but if not, then over any ground within the limits of this state, which he may deem most advantageous.

Sect. II. And be it further enacted by the authority aforesaid, That such person or persons, as are or shall be appointed for the purpose of laying out and completing the said road, under the authority of the United States, shall have full power and authority to enter upon the lands through which the same may pass, and upon any land near or adjacent thereto, and therefrom to take, dig, cut and carry away, such materials of earth, stone, gravel, timber and sand, as may be necessary for the purpose of completing and forever keeping in repair said road: Provided, That such materials shall be valued and appraised, in the same manner as materials taken for similar purposes, under the authority of this commonwealth are by the laws thereof, directed to be valued and appraised, and a certificate of the amount thereof shall, by the person or persons appointed, or hereafter to be appointed under the authority of the United States for the purpose aforesaid, be delivered to each party entitled thereto, for any materials to be taken by virtue of
167 this act, to entitle him, her or —, to receive payment therefor from the United States. Passed 9th April, 1807."

Counsel for defendant then offered a certified copy of the message of President Jefferson to Congress, dated February 19, 1808, relating to the aforesaid road, as follows:

"To the Senate and House of Representatives of the United States:

The States of Pennsylvania and Maryland & Virginia having by their several acts, consented that the road from Cumberland to the state of Ohio, authorized by the act of Congress of March 29, 1805, should pass through those states, and the Report of the Commissioners communicated to Congress with my message of Jan. 31, 1907, having been duly considered, I have approved of the route therein proposed for the said road as far as Brownsville, with a single deviation since located, which carries it through Uniontown.

From thence the course to the Ohio, and the point within the legal limits at which it shall strike that river is still to be decided."

Counsel for defendant then offered in evidence an act of Congress approved March 3, 1811, Chap. 45, appropriating $50,000 for the construction of a road from Cumberland to Brownsville.

Also Act of Congress approved May 6, 1812, appropriating $30,000 for the making of a road from Cumberland to Brownsville.

168 Also Act of March 3rd, 1813, appropriating $140,000 to the making of a road from Cumberland to the State of Ohio.

Also an Act of February 14, 1815, appropriating $100,000 for the making of the road between Cumberland and Brownsville.

Also Act of April 16, 1816, appropriating $300,000 for the making of the road from Cumberland to the State of Ohio.

Also Act of March 3rd, 1835, appropriating $646,186.58 for repairs on the road in Maryland, Pennsylvania and Virginia.

Also Act of March 3, 1835, appropriating $1182.87 for repairs on the Cumberland Road.

Also Act of June 24, 1834, appropriating $300,000 for the entire completion of repairs east of the Ohio to meet the provisions of the Acts of Pennsylvania, Maryland and Virginia.

Also Act of March 3, 1837, Chap. 46, providing for the continuing of the road in Ohio, Indiana and Illinois, and appropriating the sum of $397,183.63 therefor.

Also Act of May 21, 1838, making an appropriation of $9000 for the completion of the bridge over Dunlap's Creek at Brownsville.

169 Counsel for defendant then proposed to prove that the route of the National Pike as originally planned by the commissioners appointed by the United States to lay out said road, approached the Monongahela River at the point now occupied by the defendant company's bridge, and that the government had originally intended to construct a bridge to carry the National Pike across the river at that point; that the National Pike as later constructed terminated at a point near Dunlap's Creek before reaching the site of defendant's bridge, and that the travel on said pike crossed the river by ford either at Krepp's Landing below the bridge site or at a point just above the location of the bridge; that after the bridge was constructed by the defendant company in its present location, the government erected an iron bridge over Dunlap's Creek and built an extension to the National Pike, carrying it up to, and connecting it with, the bridge of the defendant company and along the original route as planned by the commissioners. This was for the purpose of showing that the bridge of the defendant company as at present located and constructed was erected in pursuance of the invitation of the Government of the United States and with the acquiescence and approval of the latter.

In pursuance of this purpose, counsel for the defendant then offered in evidence a duly certified copy, under the seal of the War Department of the United States, of a plan of the ground near the mouth of Dunlap's Creek, prepared by Captain Richard Delafield, Captain of Engineers, U. S. A., and transmitted to Brigadier General Charles Gratiot, Chief of Engineers, U. S. A., showing the loca-

tion of a proposed iron bridge over Dunlap's Creek on the Cumberland Road between Brownsville and Bridgeport and the location of the old county bridge over the same stream, and suggested
170 approaches from each of these bridges to the Monongahela Bridge, erected by the defendant. Said plan was marked Exhibit 8, and is annexed to this Bill of Exceptions and made part thereof.

In pursuance of the same purpose Counsel for defendant then introduced in evidence duly certified copies, under the seal of the Secretary of War of the United States, of certain engineering reports and communications respecting the aforesaid bridge over Dunlap's Creek and the Monongahela Bridge in question in this case, and respecting the construction of the National Pike in such a manner as to carry the same across the Monongahela Bridge owned by defendant.

Said communications are as follows:

"National Road, 85⅝ Miles from Cumberland.

15 August 1832.

Gen'l Charles Gratiot, Chief Engineer.

Sir: . . . I have to observe that a company is now constructng a substantial bridge over the Monongahela River across from Bridgeport, thereby making the bridge over Dunlap's Creek an important link in the road and that a bridge, to answer the purpose of a common highway would not be suitable as the only connecting point between two important and increasing towns.

I have the honor to be sir

Very respectfully your most obt.

JAS. K. F. MANSFIELD,
Lt. Corps En."

171 Philadelphia, *May 19th*, 1835.

Brig'd'r General Charles Gratiot, Chief Engineer.

Sir: I forward by the mail with this the plan of the grounds about the mouth of Dunlop's Creek, indicating a position for the bridge to be built over that creek, delineated in yellow, made to suit the public interest and conform with the wishes of the inhabitants of the town of Bridgeport, as a compromise of opinion, as expressed when this subject was last submitted for your consideration. At that time it was ordered the Bridge should be constructed on the site of the old structure, on the supposition that the county bridge had always been used as the route of the National Road. Such, however, is not the case,—the pavement of the National Road terminated at the line *a-b*, on the plan in Brownsville. Whenever the River could be forded, the travel passed over a *continuation of the pavement* by -c-o- d. n., e. m. f. l. &c. then crossing the ford—at other times it passed the bridge, thence up the Morgantown road, some times to the upper ferry, via the market, on by and through different streets in Bridgeport—until the construction of the Bridge over the Monon-

gahela—last Spring—when it took the route either thro: Bank street or High street.

I must therefore request a reconsideration of this subject,
172 deeming it of great importance:—If the old site is adopted, it will be building a bridge for the Morgantown-road, from which no convenient access can be had to the Monongahela Bridge—If the route now recommended is adopted, the Bridge will be on the line as established by the Commissioners who first located the road (a fact learned from the inhabitants and not on record to by knowledge) the most favorable; shortest—and securing to Morgan-town road or High Street, an easy approach, by curving the wing walls as on the plan—a method that can not be secured on the old route—

In addition to all this I go on to construct the new bridge without interfering with the travel by the county bridge—a matter of some consideration, and expense if interrupted—Be pleased to forward the plan to me at Brownsville with your determination—The plan is necessary to me which ever route may be adopted.—

Respectfully
Your obed. ser.,

RICH'D DELAFIELD,
Cap'n of Engineers."

"ENGINEER DEPARTMENT,
WASHINGTON, *June* 23, '35.

Capt. R. Delafield, Corps of Engineers, Philadelphia.

SIR: Your communications relative to the change of location you propose for the bridge across Dunlaps Creek has been sub-
173 mitted to the President by whom I am instructed to state that while he approves fully the decision heretofore given on the subject, still as the Public in general would be benefitted by the change he has no objections to its being made provided the property holders in Bridgeport and those in Brownsville from the Point where the old road is abandoned give their assent in writing and the U. S. be at no additional expense.

The drawing transmitted by you & Mr. Rogers act of relinquishment are herewith returned.

I am, &c.,

C. GRATIOT."

In pursuance of the same purpose, counsel for defendant then offered in evidence depositions taken on behalf of the defendant of certain aged witnesses, namely William Graham, James Monroe Mitchell and Robert McKinley.

The deposition of William Graham was to the following effect:

I was born in Brownsville in 1812, and with the exception of three years have lived in Brownsville all my life. Before the Monongahela Bridge was built, the pike stopped on the Brownsville side of Dunlap's Creek right at the river; after the Monongahela Bridge was built Searight and Keys for the Government built a continuation of the pike up to the Monongahela Bridge. The Government also built an iron bridge over Dunlap's Creek.

The deposition of James Monroe Mitchell was to the following effect:

174 I was born in 1816, and have lived in Brownsville since 1822, with the exception of four or five years. The bridge across the river was completed in 1833; the bridge across Dunlap's Creek was completed in 1837. Before the Monongahela Bridge was built, the pike crossed the river at Kreps Ferry. After the Monongahela Bridge was completed, the pike was changed and built up to the bridge by Searight and Keys. I worked on this extension of the pike. Before the lock was built the river during a large part of the time was not navigable; a part of the time people crossed the chute on a log. The boats on the river were keel boats and flat boats; all boats were propelled by being pushed with poles. The river was shallow and narrow; in low times very shallow.

On cross-examination:

The Government owned the National Pike at the time when the bridge was built. I understand that the Government later turned the National Pike over to the states of Pennsylvania and West Virginia. I do not know when. I do not know by whom or by what authority the location of the pike was changed so as to connect with the entrance to the Monongahela Bridge.

"Q. Now, you know that the Monongahela River is navigable at the present time at Brownsville?

"A. Yes.

"Q. And they run other boats besides keel boats and flat boats?

"A. They don't run nothing but steamboats now.

"Q. They run steamboats at the present time?

"A. Yes.

"Q. They run towboats and packets?

"A. Yes.

175 "Q. But they did not do that in the early days before they built the lock?

"A. No.

"Q. Do you know how long since they have been running steamboats or when they commenced to run steamboats on the Monongahela River at Brownsville?

"A. That was when I was quite a boy.

"Q. They commenced to run steamboats when you was a boy?

"A. Yes. I was five or six years old when I come here. I saw them building steamboats here when I was a boy.

"Q. They run steamboats on the river before the bridge was built?

"A. Yes; they used to. They run small steamboats until the lock was built, then they put on larger ones.

"Q. They used to carry freight up and down the river before the bridge was built?

"A. Yes, the keel boats.

"Q. Didn't they in steamboats?

"A. They carried small freight.

"Q. On steamboats?

"A. Generally carried in keel boats.

"Q. How much of the year could they operate the river with steamboats before the lock was built?

"A. That depended on how much water was in the river; sometimes couldn't run at all.

"Q. It depended entirely on the water?

"A. Yes, for steam boats.

"Q. Before the lock was built they could not run steamboats when the water was low?

176 "A. No.

"Q. Do you know how much of the year they could run steamboats?

"A. No.

"Q. Could not tell that?

"A. Sometimes later in the fall than others.

"Q. About how many months in the year could they run on the river before the locks were built?

"A. Well, I never kept no account of that. I don't know.

"Q. Two or three months?

"A. Oh, yes, I suppose about three months in the year."

The deposition of ROBERT MCKINLEY was to the following effect:

I have lived about Brownsville all the time since 1820, except three years. I remember the old National Road before the Monongahela Bridge was built; it came down to the wharf at Brownsville and there crossed the river to the Fayette County side. I remember when the Monongahela Bridge was built; it was built about 1833. When this bridge was built, the pike was changed on the Washington County side so as to come up to the bridge. I was there and saw it.

On cross-examination:

In 1853 the National Pike crossed the Monongahela River at the lower end of East Bethlehem township on the Washington County side and struck Fayette County near the Brownsville wharf. There was no bridge there at that time, only a ferry.

"Q. How long did it remain there?

"A. Well some years, not very many. I don't recollect the number of years, but when they got the bridge here they didn't use it at all.

177 "Q. Now, do you not know whether the pike changed to connect with the bridge, or not, do you?

"A. I don't know.

"Q. You do not know whether the government ever changed the location of the pike or not?

"A. No; but I have reason to believe they did do it.

"Q. You do not know whether the government ever changed the location of the pike to connect with the Brownsville bridge or not?

"A. Not certain, but I think they did, and I think if they did not they ought to have done it.

"Q. About all you know about it, Mr. McKinley, is that vehicles and carriages that were in the habit of crossing the Ferry before the bridge was built crossed the bridge after it was built?

"A. Yes.

"Q. But you do not know what action the government took in regard to the matter do you?

"A. Well, certainly I don't. I presume they did take some action. I don't know certain about it."

In pursuance of the same purpose counsel for defendant offered in evidence the Minute Book of the Council of the Borough of Bridgeport containing minutes of October 2, November 7th and 11th, 1816, and July 25th and September 13th and 15th, 1817, showing proceedings of the Council authorizing and consenting to the removal of a warehouse located on the public square in Bridgeport, in
178 order to enable the building of the National Pike up to the point later occupied by the defendant's bridge, and upon the route as originally recommended by the Commissioners; this to be followed by testimony showing that said warehouse was exactly in the line of the street, which now immediately approaches the defendant's bridge.

Captain GEORGE W. LENHART, a witness called on behalf of the defendant, testified to the following effect:

I am nearly sixty-five years of age, and have lived in Bridgeport or Brownsville all my life except for three years that I lived in the country close to these towns. I have been president of the defendant company since 1890, and was a director for a period of eight or ten years before that date.

The bridge of the defendant company crosses the river at the street which is immediately above Bank Street. The bridge adjoins the public square on the southwest side of the property. The public square lies between Bank Street, Wall Street, and an alley which is the entrance to defendant's bridge.

I have no personal knowledge of the location of the warehouse which is referred to in the old minutes of the Borough of Bridgeport just read in evidence. There is no warehouse there now, nor has there been since my recollection begins.

The reputation in the village or community is that this warehouse was on the Wall Street side of the Public Square, the square being adjacent to the bridge.

179 Counsel for defendant then offered in evidence the Act of February 17th, 1816, of the General Assembly of Pennsylvania; the Act of March 16th, 1830, previously offered in evidence by the United States, incorporating the defendant company, having conferred upon the defendant company all the powers granted to certain other bridge companies by said Act of February 17th, 1816.

This offer was for the purpose of showing that the defendant acted lawfully in constructing and maintaining their bridge in question.

Said Act of Feb. 17th, 1816, was to the following effect:

"SECT. 5. And be it further enacted by the authority aforesaid, That before the president and managers of either of the aforesaid companies, shall proceed to build either of the aforesaid bridges, it shall and may be lawful for them to contract with the owner or owners of any land, for the purchase of so much thereof as shall be necessary for the purposes of erecting and perfecting either of

the said bridges, and making all the necessary works and causeways to and from the same, if they can agree with the said owner or owners, but in case they cannot agree, then it shall and may be lawful for the said president and managers of either or both bridges, as the case may be, to apply to the court of common pleas of Allegheny county, who, upon such application, are hereby authorised and required to appoint three discreet and disinterested freeholders of this state, who, after being duly sworn or affirmed faithfully to perform the duties enjoined on them by this act, shall carefully proceed to view and examine the said lands, as
180 shall be necessary for the purpose of erecting and perfecting the said bridge or bridges, and making all the necessary works and causeways to and from the same, and shall, according to the best of their skill and judgment, estimate the value of the lands so necessary to be taken as aforesaid, and having estimated the advantages as well as the disadvantages which may be sustained by the owner or owners of such lands, shall make an appraisement thereof, in writing, and the same shall return, together with a map describing the bounds of such land, to the said Court of Common Pleas, and the said appraisement having been confirmed by the court, shall be filed in the Prothonotary's office, together with the said map; and the said president, managers and company, having paid to the said owners respectively, the several sums awarded to be paid to them, together with the cost of the appraisement, the said corporation shall be entitled to have and to hold to them and their successors and assigns, the said lands, as fully as if they had been granted by their respective owners, and thereupon, and not before, it shall be lawful to commence the erection of the said bridge or bridges as the case may be.

SECT. 6. And be it further enacted by the authority aforesaid, That the president, managers and company for erecting a bridge over the Monongahela River, their successors and assigns, are hereby empowered to erect gates, and demand and receive tolls, as follows, to wit: for every foot passenger two cents; for every carriage, of whatever description, used for the purpose of trade
181 or agriculture, having four wheels and drawn by six horses, sixty-two and one-half cents; for every such carriage, having four wheels and drawn by five horses fifty cents; for every such carriage having four wheels and drawn by four horses, thirty-seven and one-half cents; for every such carriage, having four wheels, and drawn by three horses, thirty-one cents; for every such carriage, having four wheels — drawn by two horses, twenty-five cents; for every such carriage having four wheels and drawn by one horse, twenty cents; for every carriage, of whatever description used for the purpose of personal accommodation or pleasure, having four wheels and drawn by four horses, sixty-two and one-half cents; for every such carriage having four wheels and drawn by two horses, fifty cents; for every such carriage, having four wheels and drawn by one horse, thirty-one cents; for every carriage of whatever description used for the purpose of trade or agriculture having two wheels and drawn by four horses, thirty-seven and one-half cents; for every

such carriage, drawn by three horses and having two wheels, thirty-one cents; for every such carriage, having two wheels, and drawn by two horses, twenty-five cents; for every such carriage, having two wheels and drawn by one horse, eighteen cents; for every chair or other two wheeled carriage of pleasure, for every horse used therein eighteen cents; for every sleigh or sled, drawn by four horses, twenty-five cents; for every sleigh or sled drawn by three horses, twenty-cents; for every sleigh or sled, drawn by two horses, eighteen cents; for every sleigh or sled drawn by one horse, twelve and one-half cents; for every horse, mare or gelding, with a rider, six cents; for every horse, mare or gelding without a rider, six
182 cents; for every carriage drawn by oxen, or partly by oxen and partly by horses to be rated in proportion of two oxen for one horse, and in all cases a mule shall be rated in the same proportion as a horse; every head of horned or mulcy cattle, three cents; for every head of sheep or swine two cents; provided, that any person or persons attending funerals, any detachment of the military of this state or of the United States, foot passengers, attending divine service on the Sabbath day, and students or children attending school or other seminary of learning, shall at all times, be exempt from paying said toll;" Counsel for defendant then offered in evidence a duly certified copy of the record of the proceedings at No. 9 June Sessions, 1830 of the Court of Quarter Sessions of Fayette County, Pennsylvania, showing the plan and report of the Commissioners appointed by the Act of March 16th, 1830, incorporating the defendant company, to choose a site for a bridge of defendant company.

Said report is as follows:

"The undersigned Commissioners appointed by virtue of an Act of the General Assembly of the Commonwealth of Penna. entitled 'An Act to Authorize the Governor to incorporate a Company to Erect a Bridge over the Monongahela River' Report: That they met at the point designated in said Act on Thursday the 20th day of May, A. D. 1830, and after being respectively sworn and affirmed, before a Justice of the Peace, faithfully to perform the duties therein enjoined, did proceed to examine the different scites, and after mature deliberation have unanimously agreed to fix the scite for said bridge, as near where the National road crosses said river as the circumstances of the case would admit of.—Beginning on the west bank of said river, on the centre of the National Road in
183 Washington County, and running across said river, south 18¼ degrees east 45 25/100 perches to a post on the bank of the same, in the Borough of Bridgeport, thence by the same course 14 perches to a post, thence south 73½ degrees east 4.2 perches to the centre of Second street in said Borough, a draft or plot of which is hereunto annexed.

WILLIAM DAVIDSON,
GEO. CRAFT,
ISAAC MEASON,
A. OLIPHANT,
JOHN PARK,
WM. BERRY,
JOHN WATSON."

Counsel for defendant then offered in evidence duly certified copies of the record of the proceedings at No. 19 December Term, 1830 and at No. 154 March Term, 1831 in the Court of Quarter Sessions of Washington County, Pennsylvania, with respect to the location of the site of the bridge of the defendant on the Washington County side of the river. Said records showed that on petition of the defendant company representing that it was unable to agree with the owners of the land on which the site of the proposed bridge had been located, the court had appointed seven reputable and disinterested citizens of the state to examine the premises on both sides of the river at which the proposed bridge had been located, and value the lands upon which the defendant company was about to erect the bridge; that said viewers had filed in said court a report awarding the sum of five thousand dollars to Neal Gillespie, the owner of lands on the west side of the river, and that said report had been confirmed by the court on March 31, 1831.

184 Counsel for defendant then offered in evidence as an ancient document a deed dated August 15th, 1841, made by Ruth Jones to the President, Managers and Company of the Monongahela Bridge Company at Brownsville, and conveying to the latter a tract of land situate in Bridgeport, and

"bounded on the North by the Monongahela River at low water-mark, on the West by lot No. 102, on the South by Water Street and on the East by the street leading from the street leading from Second Street to the Monongahela Bridge."

Captain GEORGE W. LENHART, recalled on behalf of the defendant, testified to the following effect:

The minute books and all other books and papers of the defendant company prior to 1890 were destroyed by a fire which burned a bank building in the vault of which they were kept.

When I was a child I lived along the line of the National Pike in West Brownsville, and can remember the traffic along the pike and across the bridge fifty years ago. There was traffic continuously at that time,—four horse stage coaches carrying passengers, and the United States mails, and Conestoga wagons carrying freight: I have seen as many as ten or twelve stage coaches or Conestoga wagons travelling together. The stage coaches travelled between Baltimore or Cumberland and Wheeling or Pittsburg. The Conestoga wagons carried freight from Baltimore and the East, some crossing the bridge and others unloading at the Brownsville wharf. The traffic passing across the bridge was much greater and much more valuable than the traffic passing under it upon the river.

Nothing was brought down the river except sand, and some-
185 times apples and flour on push boats.

At the present time the nearest highway bridge above the bridge of the defendant company is at Morgantown, fifty or sixty miles distant; the nearest bridge below it is at Belle Vernon, twelve miles down the river.

"Q. This bridge is located in the Fourth pool? That is, the

building of Lock and Dam No. 4 slack watered the river up to a little above this bridge, I understand?

"A. Yes; up to Brownsville.

"Q. Can you recall what the condition of the river at the Bridge was prior to the building of Dam No. 4?

"A. No; I can't. I can recall that after No. 4 was built, until they raised the dam, the slack water didn't take it above the bar there at Brownsville, very much.

"Q. When was that done?

"A. I think about fifty-five and fifty-six. It was when they built—they raised No. 4 and built Lock No. 5 above; that is, the Navigation Company employed people and they dug the riffle out and made a channel down through right below our bridge. There was a riffle there and the navigation people dug the channel out and dug the riffle out, and made it so that boats could get through there.

"Q. Now, then, take the river as you knew it just above the bridge, up until the time that dam was raised so as to extend the slack water above the bar, what was the character of the stream there?

"A. Why right in about the bridge on for say, a quarter of a mile or more there was a kind of a pool of water. It was a little deeper there; then it got shallow for a mile or so until you
186 come up to what was called Watkins Riffle. It was a very shallow riffle and very crooked at the time.

"Q. What would be the character of this stream——

"A. It wasn't navigable, except with push boats.

"Q. And would it be navigable for those at all times?

"A. Just in times of flood. I have seen the river that it stood for three or four months that you could cross below the bridge on a foot log.

"Q. That is, for three or four months at a time you could cross the river on a foot log below this bridge?

"A. Yes, sir.

"Q. And what would be the length of the log?

"A. Well, it wouldn't be any wider than this room.

"Q. Well, what would be the depth of the water?

"A. Well, twelve to fifteen inches; sometimes not so much.

"Q. Well, what would be the size and character of these push boats?

"A. They were about seventy to eighty feet long by twelve feet wide; had a cargo box on them just of plain wood, to put the freight in them, and with room on each side to get along to pole with, to push the boats with. There was about eighteen inches to two feet of a gunwale.

"Q. And about how long did these boats continue to navigate the stream—for what part of the year?

"A. They couldn't run all the year, because the water would be so low in the chutes, they couldn't navigate the chutes. But
187 whenever there was water in the spring and fall and so on, they could pole the boats through those chutes.

"Q. You speak of chutes?

"A. On the river there are always places—riffles we call them, and the chute is the channel part of the river.

"Q. Where was this chute you are speaking of located, any particular place?

"A. There were several along the river; one was at Watkins, about two or two and a half miles above Brownsville, and there was one at Brownsville.

"Q. Take the one at Brownsville, what would be the size of that, the width at ordinary water?

"A. I think it would be perhaps forty to fifty feet wide.

"Q. And how deep would the water in that be?

"A. Well, I have known the water to be so low in there it would almost go through a barrel, the amount of water in there would go through a barrel, it got so low there. That was only once, though, that I remember of, but it wouldn't be more than what we would call a small ordinary creek flowing there, and very swift.

"Q. What would be the extent of the traffic on the river on these push boats when they did operate?

"A. Well, in the spring and fall and whenever there was little freshets.

"Q. Well, was it of a limited character, or not?

"A. Yes, sir.

188 "Q. When did the navigation of the river by means of slack water reach Brownsville?

"A. I think about '12 or '14.

"Q. Did it, when Dam No. 4 was first constructed, come up to the bridge?

"A. No, sir; the slack water would bring it up at certain seasons of the year, just up to Brownsville. Then during the summer the boats would have to stop down about ——, and that's a mile and a half below. And it wasn't until later years, that they raised the dam, that the slack water came up there.

"Q. About when was that done?

"A. Along in '56, I believe, they cleaned out the riffle and opened Lock No. 5 and Lock No. 6.

"Q. And now, after the opening of the dams above the bridge, what was the character of the traffic upon the river?

"A. Just the packet trade was the principal part of it, and rafts. The towing of rafts. There used to be a great deal of timber come down during the floods.

"Q. And was there any change made in the bridge at any time, from your first knowledge of it, before the river was navigable, other than by these push boats, down to the present time?

"A. No, sir; no change whatever.

"Q. With reference to the packets, were they of the same kind of boats that are used to-day?

"A. They were; about the same size, except that they had no Texas on them.

189 "Q. What is the texas?

"A. That is the little cabin on the roof.

"Q. That is a removable part of the boat?

"A. No, sir.

"Q. What was the extent of the packet business from that time on down to the present time?

"A. Well, the packet business from 1856 increased very materially, and we had a very large packet trade. That increased until we had a very large trade, until we had three and four boats running there, and the traffic was a great deal. It has now decreased until it is hardly noticeable. We hardly notice there are packets there.

"Q. These packets, it has been described, carry passengers as well as merchandise. To what extent is there any passenger business on the river by packets?

"A. During the summer season, from May until September, there are a great many people go on the boats for excursions up as far as Morgantown and back. Very large excursion trips of that kind. And that's the only time of the year that the boats carry passengers to an amount that would tax them, or anything of that kind.

"Q. Take it first at the ordinary times, to what extent is there any passenger traffic?

"A. Very little.

190 "Q. Would it be as much as eight or ten passengers a day?

"A. Well, I am not on the boats much, but when I do go on them I see very few people on them.

"Q. Take these excursions, they are run simply from time to time, I believe?

"A. No; the boats advertise the round trip to Morgantown and back, and people just go up for the trip; stay on the boat and come back.

"Q. And how many boats are engaged in the packet business on the entire length of the Monongahela River?

"A. There are but two regular packets.

"Q. And there are some little boats, I understand?

"A. There are two little boats from Brownsville going to Rice's Landing, just for local business.

"Q. Well, say, from Pittsburgh to Morgantown?

"A. Well, from Pittsburgh to Morgantown there are but two boats; but those little pool boats, I can't say.

"Q. I will come to those in a moment. These two packet boats between Pittsburgh and Morgantown make how many trips?

"A. The one leaving here to-day gets to Morgantown to-morrow and leaves Morgantown that day. One boat goes up every day and one boat comes down every day.

"Q. Those little boats are the small boats that operate in the pools?

"A. Just for local travel; yes. Stop at every little landing.

191 "Q. The other class of traffic on the river is boats carrying coal, so far as it passes under this bridge, I mean?

"A. Carrying coal.

"Q. Limited to that?

"A. Yes, sir."

Counsel for defendant then offered to prove by the witness on the stand, to be followed by other witnesses, that the bridge of the defendant, prior to and at the time of the making of the order of the

Secretary of War, and at the present time, was not and is not an unreasonable obstruction to the free navigation of the Monongahela River; and, in this connection and for this purpose, also offered to show the kind and character of the traffic upon the river for the last thirty years and at the present time, and that all of this traffic has passed under the bridge without any accident at this bridge; that the presence of the bridge does not prevent the passage under the same of all of the traffic carried upon the river, and that for more than thirty years there has been no change in the kind or character of the traffic passing under the bridge and the craft navigating the river, and that it is not necessary to make the proposed changes in the bridge for the purpose of making navigation reasonably free and unobstructed.

To this offer counsel for the United States objected as incompetent and irrelevant. The objection was sustained for the reason that this question was concluded by the decision of the Secretary of War. Exception was noted for the defendant. The witness continued:

192 The receipts of the defendant company from its bridge for each of the years 1902 and 1903 were between fifteen and sixteen thousand dollars; for 1904 they were between eleven and twelve thousand dollars, and for 1905 they were thirteen thousand dollars. During this same period the annual net earnings were nine or ten thousand dollars, and the annual operating expenses two thousand or twenty-five hundred dollars.

Our bridge is well constructed and could afford accommodation for several times the present amount of traffic. From twenty-five hundred to sometimes as high as four or five thousand foot passengers cross the bridge daily.

The amount invested in the bridge is from $65,000.00 to $75,000.00. But to build a bridge of the same structure to-day would cost from $130,000.00 to $140,000.00. The pine timber of the bridge is now worth more than the whole cost of the bridge.

On cross examination by Mr. DUNKLE, witness testified:

"Q. When did you say you were born?

"A. In April, 1842.

"Q. Were there any steam vessels on the Monongahela River back in 1850?

"A. Yes. That is, boats, you mean?

"Q. Yes.

"A. Yes, sir.

"Q. Then there was traffic on this river as early as 1850?

"A. Up to Brownsville only. Not under this bridge; there was no regular traffic of steam boats under this bridge at that time. The Brownsville wharf is just below the bridge.

193 "Q. Hadn't steam boats been built above the bridge and come through below the bridge prior to that time?

"A. There was a boat yard right at the up river end, but they wouldn't finish the boat up there; they would just build the hull of the steamboat up in there.

"Q. They couldn't get the hull of the steamboat under the bridge, couldn't they?

"A. Yes, sir.

"Q. Why wouldn't they put the top part on there?

"A. They did build the wood work up in there, but before they put the machinery up they brought them under the bridge, because there was no machine shops; there was no trouble to get them under the bridge.

"Q. What I am getting at is, there were steamboats plying on that river as early as 1850?

"A. Yes; as far as Brownsville.

"Q. And above Brownsville, weren't there?

"A. Not except the little boats, during a freshet; in a freshet, there might be some little boats go above Brownsville.

"Q. Wasn't all steam boat traffic at that time confined to freshets?

"A. No, sir.

"Q. Before the dams were put in, they couldn't operate above there?

"A. The dams were in in 1850.

"Q. And the slack water of that dam was how far?

"A. Just came to the lower part of Brownsville.

"Q. Then during the Freshet season they used this river above the bridge?

"A. Not the packets. Those little independent boats
194 would go up occasional trips.

"Q. Weren't there vessels—you have heard the history or know the history of the navigation on this river, I presume?

"A. Well just by being raised there around Brownsville all my life.

"Q. Haven't you heard of the navigation of this stream as early as 1814 or '15?

"A. The first steam boat that ever went to New Orleans is said to have been built there. My father helped to build boats there.

"Q. Well, that is above where this bridge is located?

"A. Yes, sir.

"Q. What is the reputation in the community as to when the first steam boats went to Morgantown, West Virginia, and plied between Morgantown and Pittsburgh and other towns?

"A. The steam boats didn't commence to ply between Morgantown and Pittsburg until recent years, until the Government built their locks up there. In the fall of 1856, the boats began to reach to Geneva. That was when the Government built Lock No. 5 and Lock No. 6. Then they raised Lock No. 4 to enable them to get up that far.

"Q. Did you ever hear of a lock and dam being built at Millsboro by the State of Pennsylvania?

"A. Yes, sir.

"Q. Was it above where this bridge is located?

"A. Yes, sir.

"Q. When was that built?

"A. I can't state when it was built. I can remember
195 the dam. I didn't know there was a lock there.

"Q. Well, don't you know by reputation that it was built before this Bridge was built?

"A. I do not, sir.

"Q. You would not say it was built afterwards?

"A. I can't say when it was built.

"Q. You don't know?

"A. No. I know the dam. In the fall of 1856 I was employed on one of the packets that made the first trips, started to run from Brownsville up to Geneva. In low water, you could see part of the old dam at that time that was in the river."

"Q. Do you say that the changes required to be made by the Government in this case would be a total destruction of that bridge?

"A. I do.

"Q. You mean simply the superstructure, do you?

"A. It would require new abutments and the removal of all the piers. It would reconstruct everything.

"Q. The notice to you as President of that Bridge Company from the Secretary of War doesn't require the removal of the abutments, does it?

"A. It doesn't. The notice says we shall commence at the face of the eastern abutment and raise twelve feet from there. Well, now, that is in shoreways sixty feet from the line that we have that way. And to comply with that, on account of the railroad being right in front of the bridge, we would have to raise 21 feet clearance on that abutment, which would run our approach some 200 to 250 feet in through the town.

196 "Q. Your abutment there, you say, is a good one, isn't it?

"A. It is for the present bridge; but whether it would be substantial and strong enough to bear a bridge 21 feet higher, I wouldn't be able to say.

"Q. Well, it wouldn't be any heavier, would it?

"A. I should say it would.

"Q. Why, if your approach is 61 feet higher, would that be heavier than the other one?

"A. You would have to make your foundation higher. And the higher you make the foundation the more it is liable to be affected by the vibration of the wind and things of that sort.

"Q. You are not a bridge builder, I suppose?

"A. No; I am not.

"Q. You haven't examined this abutment with the idea as to whether or not it could be raised the 12 feet?

"A. I have superintended the repairing — one of the abutments, as President of the Bridge Company.

"Q. But you don't know but what this abutment could be raised the 12 feet that is necessary under the Secretary's notice, do you?

"A. Yes; I can say I believe they couldn't be, because of their thickness. The one on the eastern shore, which he says to raise, was cracked and was dangerous and we had to put a retaining wall in there to support it.

89

"Q. Then, your bridge, in other words, is not in good condition?

"A. It is for the present structure good.

197 "Q. There was nothing in this notice that contemplated the removal of these abutments, was there?

"A. Not the abutment on the shore."

On re-direct examination, witness testified to the following effect:

The dam at Millsboro was simply a dam for water power, according to my understanding.

The long approach that would be required for the reconstruction of the bridge would occupy a public highway in the town. The property on one side of the portion of the highway taken for the approach includes a hotel and would sell for about $120,000.00, and that on the other side includes a machine shop and other buildings, and would sell for about $80,000.00. It would be necessary for the bridge to cross the railroad overhead, and the effect on these properties of building the new approach so as to make that possible would be to close up the highway that passes them and damage these properties to the extent of one-third to one-half of their present value.

E. K. Morse, a witness called on behalf of the defendant, testified to the following effect:

I live in Pittsburgh and am a consulting civil engineer. I have had special experience in designing and constructing bridges, since 1876. My experience includes a knowledge of the conditions under which bridges are constructed and maintained in and about Pittsburgh and especially over the Monongahela River. I

198 made a careful examination of the defendant's bridge in 1904, in order to determine its physical condition.

"A. I found the masonry piers were old in construction, massive, cracked in a number of places. The east abutment, that is, on the Brownsville side, or what they call Bridgeport, was in fair condition. The other pier, on the opposite side, which is West Brownsville, was not in as good condition as the other side. This one showed indications of being repaired on the face. The other did not.

"Q. What did you find the condition to be with respect to whether or not the bridge was in good condition and safe and sound for travel?

"A. The super-structure, the main timbers and the roof and decking covering them, and, to a certain degree, the planking, was in good condition, and with masonry of that character, and so massive, the life of the substructure, would no doubt be equal to that of the superstructure, and at that time I estimated that the life of the superstructure was sufficiently good for twenty years.

"Q. What is the character of the superstructure of this bridge, the wood work, as to whether it is of an unusually good and excellent character?

"A. These were old fashioned wooden bridges, built by the de-

signer, Burr, and selected from the best white pine that could be obtained I might qualify that by saying that I am speaking now especially of the arches; because the rest of it could be stripped off and the arches would carry the load better than if it had that additional burden.

199 "Q. Could you give me the length of the bridge?

"A. The length of the old bridge, which is somewhat longer than a new structure would be, a few feet, is 676.7. That extends out a little further than a new structure would.

"Q. And what is the distance between piers?

"A. Well, the centre distance is not marked on this exactly, what that river width of pier is at pool full; but the centre width of the first span, beginning on the south bank, that is Brownsville, is 221 feet from the end of the plank to the end of the first pier. Then from centre to the centre of the two channel piers is 227 feet. The next span, which is from the centre of the left pier to the end of the present structure, 223.

"Q. And what is the height of the bridge above pool full?

"A. That varies. At the side of the flanking span it is 38 feet, or 38.5; and at the centre of the channel span 40.6 feet above pool full.

"Q. Have you seen the order of the Secretary of War, or a copy of it, giving notice to the bridge company to change this bridge so as to give a channel span of not less than 390 feet in length between the face of the right abutment as now located and the centre of the pier, and that the channel shall give a clearance height of not less than 52 feet above the fourth pool of the river, and, in view of that notice, examined as to the feasibility of building a new structure?

200 "A. I have.

"Q. Now first, what is the effect of that notice upon the existing structure, as to whether it can be remodeled so as to comply with that order, or does it require a total demolition of the existing structure?

"A. The abutments, I believe, could be used practically as they are, with perhaps slight repairing on the west bank. The spans, being the old fashioned wooden Burr arches, would have to be removed. The two piers, with only the maximum clearance from centre to centre of 227 feet, would naturally have to be removed.

"Q. Is it practicable at the present time to rebuild there a wooden bridge?

"A. No; we don't build wooden bridges to-day.

"Q. What is the situation at the east side, or at the Bridgeport side of the bridge, as to the presence of the railroad tracks and the effect thereof upon the construction of a new bridge?

"A. The Monongahela Railroad goes right past the end of the bridge.

"Q. At what elevation?

"A. An elevation of 777.1 to the top of the rail.

"Q. I want it as compared with the floor of the bridge. Is it at

the level of the floor of the present bridge, approximately? It crosses the approach at grade?

"A. That is practically only one foot below the present bridge.

201 "Q. And it is at the surface of the approach?

"A. Yes, sir.

"Q. And how close is it to the bridge structure itself?

"A. About twenty-eight feet.

"Q. And what is the effect of that upon the construction of a bridge, taking into account that the notice of the Secretary of War requires them to have a clearance above pool full of 52 feet?

"A. I have submitted two designs for that. And one of them would contemplate a channel span in the middle, using the old abutments there. The other, if you had to raise 52 feet and give your clearance clear up to practically the Bridgeport side, would throw you over the railroad.

"Q. And what would be the effect, then, on your approach at the Bridgeport end, as to whether you would have to extend out along the street in front of built up property?

"A. Well, you wouldn't do that. You would change the location of the approach, and set it either up or down, so that you would have only one party to deal with and not both. That is a good hotel there, and good property, and this is a manufacturing site. My idea was to throw it this side of the property line there.

"Q. Then your idea would be to buy the property on one side of the street and occupy it with the bridge approach?

"A. Yes, certainly.

"Q. That is the Bridgeport side?

"A. Yes, sir.

202 "Q. Now at the other end, what is the effect? Do you go down to the grade of the existing approach?

"A. With one of the designs submitted, you do; the other one you don't. But with this one where you go over the railroad, then you bring the grade down and practically come out as it is now."

To make the changes in the bridge required by the order of the Secretary of War would cost $112,859.00 according to an estimate I have prepared. This estimate does not include the engineering expenses or the cost of building the approach in Bridgeport.

On cross-examination:

"Q. This new bridge that you are testifying to as costing $112,000, is an iron bridge, is it not?

"A. Steel.

"Q. A steel bridge. And the value would be very materially different, very much greater than that of the old structure as it now stands there, the wooden structure?

"A. It would be next to impossible to get the material that is in the old structure to-day. We don't have such white pine. We couldn't order it. It could hardly be found.

"Q. I wasn't asking that. I am asking whether the new structure wouldn't be more valuable.

"A. It would be more valuable in that it was a steel bridge.

"Q. Answer my question. Wouldn't the new structure be more valuable than the old?

"A. More valuable?

"Q. Yes.

"A. Yes, sir.

203 "Q. As an investment?

"A. It would be a new structure, built on modern lines of construction and it would be steel, and the other is an old wooden structure.

"Q. The old wooden structure is practically out of date, and wouldn't answer the present purpose of a bridge for electric cars or anything of that kind?

"A. You could hardly run electric cars across that bridge as it is to-day. It would be practically impossible.

"Q. Isn't that section growing and likely to require such improvements?

"A. Yes, sir."

I prepared a plan for the defendant company which was used at the hearing before the Engineer of the United States Army. The plan included in Exhibit "B" in Major Sibert's report to the Secretary of War, admitted in evidence in this case is a copy of the plan which was prepared by me and used at the hearing. I believe that Major Sibert used my tracing and incorporated it in his exhibit. That plan would comply with the order of the Secretary of War; it would give a span 400 feet from the centre of the column on the east side to the centre of the pier with a clearance of 52 feet. That plan included the retention of the present abutments of the bridge. I contemplated using the west abutment, on the West Brownsville side with slight modifications, and the east abutment on the other side practically as it is, and building a viaduct over from that point. The plan used at the hearing before Major Sibert and adopted by him in his report to the Secretary of War shows the same bridge that I testified to on direct examination, and the cost of each is the same.

204 "Q. You say the life of this old bridge is 20 years, as you would estimate?

"A. Yes, sir.

"Q. What would be the life of the new bridge that is contemplated by the plan which you have suggested?

"A. That is constructed of steel. If it was not well painted and very carefully taken care of, it would be very short. If it was wrought iron, it would stand almost any kind of abuse. It would be indeterminate. It would be indeterminate in both cases, if given proper care and attention.

"Q. Then, if it was given proper care, it would be indeterminate?

"A. Yes; I don't know. Nobody knows at this time."

CHARLES L. SNOWDEN, a witness called on behalf of the defendant, testified to the following effect:

I have lived in Brownsville for fifty years. I am a director of defendant company and have been connected with it for twelve or fifteen years.

A new steel bridge such as was described by Mr. Morse would have no greater earning capacity or income than the present structure, which takes care of all the traffic the defendant company has or can have.

An approach to the bridge on the Bridgeport side of the river, crossing the railroad overhead would cost at least $50,000.00.

205 Captain H. B. COX, a witness called on behalf of the defendant, testified to the following effect: I am not a stockholder of the defendant company. I was born and raised in Bridgeport and live there. I am sixty-eight years of age. I can recall the condition of the Monongahela at Brownsville for probably 60 years, but do not recollect much about it before the construction of Dam No. 4.

"Q. When you first recall the situation at the Brownsville Bridge, was the river slack watered so that the navigation improvement, extended up above the bridge, or did it stop below?

"A. There was a riffle just below the bridge. It was slacked up to that. It didn't go over that riffle at all.

"Q. There was a riffle below the bridge, and the slack water came up to that riffle, and didn't go below the bridge?

"A. Yes, sir.

"Q. At that time, what was the character of the stream above this riffle?

"A. Well, from the bridge up for a couple of miles there was a pool in there.

"Q. Above the riffle?

"A. Above the bridge.

"Q. Was there any navigation on the stream at that time, any boats? If so, what kind of boats and when?

"A. Above the bridge?

"Q. Yes.

"A. Well, there were flat boats above there.

206 "Q. They had flat boats?

"A. They had flat boats and keel boats.

"Q. And how would those be navigated?

"A. Pushed.

"Q. Push boats?

"A. Yes, sir.

"Q. Did they operate all the year, or when the water got up to a certain height?

"A. The flat boats operated most all the time; there would come a raise in the river and the little boats would make trips occasionally.

"Q. And how often would these flat boats navigate, coming down under the bridge, say, if you can tell me?

"A. Well, I suppose once a week.

"Q. About how wide was the stream up above this riffle?
"A. Well, the full length of the river up there.
"Q. Well, I want to get some idea of whether it was a river or a large or a small creek, or how you would cross it.
"A. Above the bridge?
"Q. Yes.
"A. Well, I judge this pool was probably five or six hundred feet wide.
"Q. And how was it under the bridge?
"A. Well, the pool started about at the bridge.
"Q. And how wide would the pool be?
"A. Five or six hundred feet.
"Q. Long, you mean?
"A. No; it was that wide from bank to bank.
"Q. And then it would come to a riffle again?
"A. Yes; another riffle.

207 By the COURT:

"Q. How long was this pool? How far up the river did it extend above the bridge?
"A. Probably a mile and a half.

Mr. BEAL:

"Q. Then what would you come to?
"A. Come to another riffle.
"Q. And what would be the size of the riffle there?
"A. Well, it would be just swift running water, you know.
"Q. About how deep would the water be over this riffle, ordinarily?
"A. Well, that would maybe be a few inches and maybe a few feet.
"Q. Depending on whether the river was in flood, or the stage of water in the river?
"A. Yes, sir.
"Q. And what was the depth of this pool that began at the bridge and went up for some distance?
"A. Well, that varied. It might be in some places probably ten feet, and in some places it wouldn't be two feet."

Counsel for defendant then offered in evidence an Act of the General Assembly of Pennsylvania, approved March 31, 1836, and published in the Pamphlet Laws of that year at page 262; being an act to incorporate "The President, Managers and Company of the Monongahela Navigation Company." Said act provided as follows:

208 "SECT. 8. It shall and may be lawful for the said president, managers and company, their superintendents, surveyors, engineers, artists and workmen, to enter upon the said river Monongahela, and upon the lands on either side, and to use the rocks, stones, gravel or earth which may be found thereon, in the construction of their works, first giving notice to the owner or oc-

cupiers of the land, and to form and make, erect and set up dams, locks, or any other device whatsoever, which they shall think most fit and convenient to make a complete slackwater navigation between the points herein mentioned, to wit: the city of Pittsburg and the Virginia state line; and that the dams which they shall so construct for the purpose of slackwater navigation, shall not exceed in height four feet six inches, and that the locks for the purposes of passing steam boats, barges, and other craft, up and down said river, shall be of sufficient width and length to admit a safe and easy passage for steam boats, barges, and other craft, up as well as down said river; they shall make amends for any damage that may be done on said lands, and pay the owner or owners for the materials taken away, as well as for the land occupied in the construction of the said dams and water works: Provided, if the parties cannot agree, the said damages are to be valued by five disinterested freeholders, appointed by the consent of the parties, or if they cannot agree, by any disinterested justice of the peace of the proper county, and the report made by the freeholders so agreed upon, or appointed as aforesaid, or a majority thereof, shall be filed in the office of the pro-
209 thonotary of the county in which the land lies, and shall be regularly entered of record, which report, being confirmed by the court, judgment shall be entered thereon, and execution may issue in case of non-payment for the sum awarded, with reasonable costs, to be assessed by the court; and it shall be the duty of the five freeholders aforesaid, in assessing damages, to take into consideration the advantages derived to the owner or owners of the premises, from the said improvements hereby authorized: Provided, That either party may appeal to the court, within thirty days after such report may have been filed in the Prothonotary's office of the proper county, in the same manner as appeals are allowed in cases under the act entitled 'An Act regulating arbitrations,' passed the twentieth day of March, Anno Domini, one thousand eight hundred and ten: Provided further, That before entering upon or occupying any lands, said company shall give security, to be approved by the court of Common Pleas of the county in which the land lies, to pay the amount of damages, which shall be finally adjudged against them for such occupation or entry upon such land. . . .

SECT. 10. So soon as twenty miles of the slack water navigation shall be completed, the said president and managers shall give notice thereof, to the Governor, who shall thereupon nominate and appoint three disinterested persons to view and examine the same, and report to him in writing, under oath or affirmation, whether the said works have been so far executed in a workmanlike manner, according to the true intent and meaning of this act; and if at any time their report shall be in the affirmative, then the Governor shall, by license, under his hand and the seal of this commonwealth,
210 permit the said president, managers and company, or such person as they shall from time to time appoint, to collect the tolls. . . .

SECT. 11. It shall be the duty of the commandant of any boat, barge, or other vessel navigating the said river, when he shall arrive

within one-fourth of a mile from any lock so erected, under the penalty of two dollars, to blow a horn or trumpet, or ring a bell, whereupon the keepers of such lock shall attend, for the purpose of opening such gate or sluice, to let the said boat, barge, or other vessel, pass without unnecessary delay, and in safety; and if any boat, barge, or other craft, shall be prevented from passing up or down any of the said locks or sluices, by reason of the lock not being raised, for more than thirty minutes, the president, managers and company shall, upon conviction hereof forfeit and pay to the person so hindered, the sum of one dollar for every thirty minutes beyond the said time that he shall be so prevented, and in the same proportions, for any longer or shorter time, and civil process in the proper county, and next to the place where the offence shall have been committed, shall be served by the owner or owners thus aggrieved, upon the aforesaid president, managers and company.

SECT. 12. If the president, managers and company shall neglect or refuse to keep in good order and repair, any dam, lock, or sluice, of their own construction, or shall neglect to remove any obstacle which may occur therein, so that boats, barges, rafts or vessels, cannot at all times safely navigate said river, when the same is not prevented by ice or other unavoidable cause, they shall for every such offence pay the sum of fifty dollars.

211 SECT. 21. That the said company hereby incorporated, be and they are hereby authorized and empowered to procure the right from the proper authorities of the state of Virginia, to extend the said improvements from Pennsylvania state line, as far up the said river as the said company may deem practicable."

GEORGE L. MOORE, a witness called on behalf of the defendant, testified to the following effect:

I can recollect the condition of the Monongahela River at Brownsville since 1852 or 1853.

"Q. What was the character of the stream at that time when you first knew it?

"A. In my first recollection the No. 4 dam slacked the water almost to the Brownsville landing. In cases of extreme drouth, it would not reach the point quite by a mile or so.

"Q. And that landing was below the bridge, was it?

"A. Below the bridge.

"Q. Now go ahead, and in your own way tell us of the character of the stream and of the traffic on it?

"A. At a point just above the landing was the first riffle or shoot that has been spoken of, and as I recollect it, as it has already been described. And those riffles would occur every mile or two or three miles from that on to Morgantown, a distance of 52 miles. In some places the fall would be somewhat greater than at others, and the greater the fall the less the depth of water in the channel or chute. And from Brownsville to Morgantown, or from Brownsville to Geneva, there was a traffic carried on to some extent with flat boats during the spring and early summer of the year. These flat
212 boats would draw, when empty, four or five inches. They would load them according to the water in the channel or in

these chutes. If there was a freshet and water enough, they might load them a foot or fifteen inches, perhaps. They would be from 15 to 20 inches deep, these boats, these gunwales; load them with freight, covered with canvas. They were pushed, on what they used to term cordells, through these chutes. Then they would take out a line and pull them up with a line.

"Q. How is that?

"A. They pulled them up with lines. They would have a capstan on them, and take a line out ahead and wind the rope around and pull them up through. That was the means of getting up through them. Of course they would come down and often have to have a lightener, take a portion of the load off, to get over the low places and to double up again after they got through. And I can remember about the first steam boat that went up above there. They would make occasional trips, during the early spring, from Brownsville,—well, it was from Pittsburgh to Morgantown.

"Q. That would be in times of high water.

"A. In the early spring; yes. Or a flood in the fall, or any time during the year that there was water they would make a trip.

"Q. Would this traffic in keel boats and flat boats be continuous, or when the water got low would they have to stop again?

"A. They would have to stop in the extreme low water.

213 "Q. Can you tell me to what extent, how long that interruption would last?

"A. In some years it would be two or three months that perhaps there would be no communication over the river."

Dams No. 5 and 6 were built above the defendant's bridge by the Monongahela Navigation Company in 1855 or 1856. The height of lock and dam No. 4 was raised about 1855.

On cross-examination:

Lock and dam No. 4 had to be raised in order that the slack water reach Dam No. 5.

"Q. You have stated that during the time you knew this river steamboats plied on the river at certain seasons of the year?

"A. Yes; a little.

"Q. That was up to Morgantown in West Virginia?

"A. Yes. That is, occasionally to Morgantown; more frequently to Point Geneva.

"Q. Where is that?

"A. That is near the State line.

"Q. That is above this bridge?

"A. Oh, yes.

"Q. You say there was a dam constructed on this river as long back as you can remember?

"A. Yes, for water power. There were several of them on the river. This one referred to at Millsboro was the only one that I recollect. It was built on a more extensive scale than any other one on the river and provided better water power than any others.

214 "Q. It was built for navigation, was it not?

"A. No, sir, for water power, only.

"Q. You say there was a lock put in the dam?

"A. Yes, sir.
"Q. Wasn't that for navigation?
"A. That was to let the flat boats through it.
"Q. Then, to that extent, it was for navigation?
"A. Yes, sir. It wasn't to create slack water. That wasn't the intention of the lock and dam.
"Q. The steam vessels plied on this river when the river was high enough, didn't they?
"A. Yes; if they had any business. They didn't make any regular trips.

By the COURT:

"Q. That was after Dams Number Five and Six were built, or Number Four?
"A. From the time Number Four was built up until the time Numbers five and six were built; previous to the building of Numbers Five and Six.
"Q. There was steamboat traffic above the bridge?
"A. Occasionally.

Mr. DUNKLE:

"Q. And this was as long back as you can remember, when vessels were plying on this stream?
"A. Yes, sir.
"Q. How high would the water have to rise before steam boats could run between Brownsville and Morgantown?
"A. Well, there would have to be four or five feet of water.
215 "Q. And that was in the freshets?
"A. Well any time during the year. It might occur, maybe, in July or September; at any time of the year.
"Q. But this navigation of these steam vessels was only during the freshet on the river?
"A. Yes; it was irregular.
"Q. And lasted for a few days?
"A. Only."

It was admitted by counsel for the United States and for the defendant, for the purposes of this case, that Locks and Dams Numbers One and Two in this river were completed in the year 1840 or 1841, and that Locks and Dams Numbers Three and Four were completed about the year 1844; and that all of these were built by the Monongahela Navigation Company; that being the company, the Act incorporating which has been offered in evidence.

Captain W. A. EDMISTON, a witness called on behalf of the defendant testified to the following effect:

I am sixty years old and all my life have lived in Brownsville, and have known the Monongahela River.
"Q. What was the condition of the river, from a point below the bridge, when you first knew it—what sort of a stream was it?
"A. I remember it, I believe, in 1856, that there was a very little river there. It ran through a very narrow channel, and was crossed

over by this foot log that you have heard spoken about.

216 "Q. Crossed the river at that point below the bridge on a foot log?

"A. Yes, sir.

"Q. And what was the general character of the stream from that on up, as to the water?

"A. Well, of course, the water would spread all over from bank to bank, but just in shallow pools.

"Q. And can you recall what, if any, navigation there was upon the river at that time?

"A. No; my first recollection was the steam boat.

"Q. You don't recollect the old flat boats and keel boats?

"A. Only by tradition.

"Q. Well, do you have any recollection of navigation by steam boats prior to the construction of the locks and dams?

"A. The locks and dams above Brownsville?

"Q. Yes, sir.

"A. Yes; I knew there was a regular packet line from Brownsville to Pittsburgh before Five and Six were completed.

"Q. But I mean navigation by steamboats on that part of the river which had not yet been slack watered?

"A. No; I didn't know much about that at that time."

On cross-examination:

"Q. Don't you know that when the river was in condition for it, vessels did ply on this river between Brownsville and Morgantown, West Virginia?

"A. My earliest recollection is about 1856, and at that time the locks and dams were completed above, and of course there was steam boat navigation on it at that time.

217 "Q. Then your recollection doesn't go back to the time that the locks and dams were built above the bridge?

"A. I remember before they were opened. That was about that year.

"Q. That is about the first you recollect?

"A. Yes, sir.

"Q. And at that time steam vessels were plying on the river?

"A. No, sir; not above. The locks were not open yet.

"Q. Not that you know of.

"A. Not that I know of.

"Q. What stage of river would there have to be before steam boats could navigate this river above Brownsville?

"A. Well, you would want four or five feet of water, I suppose."

On redirect examination:

"Q. You were asked as to what stage of water there would have to be in the river in order that there might be navigation above the bridge by steamboats, and you said four or five feet. Prior to the building of the dams, however, what stage of water would you have to have so that a steam boat could go up and back?

"A. You would want five or six feet of water for safe navigation, before slack water.

"Q. What stage of water would you have to have, taking into consideration the time required to make a trip up and back, and taking in view the fact that the river would still have to be up to
218 four or five feet when you got back?

"A. I imagine the river would fall very rapidly, and you would have to have probably more than four or five feet, in order to make a trip safely and return.

"Q. How rapidly would the river fall in these freshets?

"A. Well, they would run off very rapidly there, when there was no obstruction.

"Q. Well, give us some idea of how quickly they would drop. Was it as fast as a foot an hour?

"A. At times it would be; yes, and more rapidly than that, and sometimes less.

"Q. And it would rise how rapidly, a foot an hour or a foot and a half an hour?

"A. In the same proportions, sometimes.

"Q. So that, what I want to get at is the fact that a four or five foot stage of water wouldn't enable you to make a trip up and back?

"A. It would probably be unsafe to start."

On recross examination:

"Q. Now, don't you mean to say that this river rises and falls a foot an hour, do you?

"A. Yes, sir.

"Q. As a general rule?

"A. Oh, I didn't say as a general rule. But I have seen it fall that rapidly and rise more rapidly.

"Q. That is, when there was an ice gorge or something of that kind?

"A. Oh no: nothing of the kind, sir. Natural conditions."

Defendant rested.

219 Counsel for the United States then offered in evidence in rebuttal a copy of Executive House Document of Commerce No. 126, being the report of William Howard, civil engineer, who was employed to make a survey plan and estimate for the improvement of the steamboat navigation of the Monongahela from Pittsburg to Brownsville, dated February 5, 1833, and transmitted to the House of Representatives in compliance with a resolution of March 1, 1833.

This offer was for the purpose of showing that the United States Government had contemplated the slack water improvement of the Monongahela River in 1833, when defendant's bridge was built, and was made in connection with the Acts of Congress approved April 30th, 1824.

Said report was as follows:

"Between Brownsville and Pittsburgh, the part of the river we have particularly to consider, the general direction of the Monongahela is somewhat to the west of north, but its course is very serpentine, insomuch that, although the distance between these two places, in a direct line, is less than 29 miles, the distance by the course of

the river is 55 miles. The river at low water, is composed of a succession of pools, some of them six or seven miles in extent, separated from each other by ripples or bars. These pools have generally a sufficient depth of water for all the purposes of navigation, interrupted, however, occasionally by portions of shoal water of considerable extent. The bars are usually found immediately below the mouths of the several tributary creeks, and are composed of gravel, with occasionally some loose stone and rock, so that they are possessed of a certain degree of stability, and are not subject to
220 any but gradual changes. The fall of the river accumulated at some of these ripples, is so great, that it has, in several instances, been applied by means of wing dams as a moving power to mills. Owing to the character of the streams which form the Monongahela, the quantity of alluvial matter brought down it, during freshets, is too small to offer a serious obstacle to any works which it may be deemed necessary to place in its bed.

The average breadth of the river may be stated at 250 yards from Brownsville to the mouth of the Youghiogheny. Below the junction of this stream, the breadth increases considerably, so as to average nearly 400 yards.

The descent of the river from Brownsville to Pittsburgh measured on the surface, is, as will be seen by a reference to the profile, in a distance of 55 miles, 30.6 feet at low stage of water. But, as the rise of freshets at Brownsville frequently exceeds 35 feet, while it is not often more than 15 or 18 feet at Pittsburgh, the difference of level at the surface between the two places is, of course, greater at high water. At such times, every distinction of pool and ripple disappears, the surface of the river forming nearly an uniform inclined plane, offering no other obstacle to its navigation than the rapidity of the current. . . .

Another branch of industry, which is carried on with great activity, is the building of steamboats, mostly intended for the lower Ohio and the Mississippi. The hulls for these are most usually floated down the current, at high water, to Pittsburgh, where they receive their engines and their last finish. A list, which
221 is still incomplete, enumerates sixteen steamboats built during the last year, at different points between Brownsville and Pittsburgh. These boats vary from 80 to 600 tons burden; the largest of them is the Majestic Mediterranean, whose keel is 175 feet long, and which was built at Elizabethtown. . . .

The transportation between Brownsville and Pittsburgh, is now carried on by means of steamboats, keelboats, and also by flats and rafts, which last only descend the river, and are broken up on arriving at their destination. The steamboats which are built expressly for this trade, are very small, seldom exceeding 50 or 60 tons burden, and are only able to ply at intervals for a small part of the year. When the water is too low to permit their use, their place is supplied by the keelboats, whose management requiring a large amount of human labor renders the transportation in them expensive in proportion. . . .

It therefore remains to consider the two methods of improving the

river by works in its bed, namely, by sluices, or by locks and dams.

1st. Sluice navigation. . . .

The small steamboats which are now used for the communication between Brownsville and Pittsburgh, cannot, under present circumstances, be enlarged with advantage, on account of the imperfect condition of the river. These small boats, however, are much more expensive in proportion to their tonnage than those of a larger size. It appears plain, that any plan for the improvement of this river, to be completely efficient, should provide for the ready passage, up and down, of boats at least as large as those which have been found
222 to be adapted to the navigation of the Upper Ohio; so that a boat taking in its freight and passengers at Louisville or Cincinnati, may proceed directly, without obstacle or delay, to Brownsville. If we enlarge the width of the sluices sufficiently to accommodate boats suitable to this purpose, there are seasons of the year when, for a considerable time, the river would not afford water enough to render them passable by steamboats of even the smallest size. . . .

After all, if we exhaust the resources of art in making a sluice navigation as perfect as possible, what results can we expect from our labor? We may extend the time perhaps a month or two, during which the river may be used by steamboats of the small size now employed, and perhaps, throughout the year, by keelboats, except when prevented by ice. We should, however, produce such a velocity of current as would often require the utmost force of a steamboat to stem it, and would render the passage up still more difficult for keelboats than it is at present; although even now these boats frequently find great difficulty in making the ascent, even with the assistance of teams of oxen or horses, and their contrivances for warping. . . .

2d. Lock and dam navigation. . . .

But however perfectly these works may fulfil the object, when applied to a navigation entirely artificial, they are, by no means, of such universal application to the improvement of a natural but imperfect navigation. To render them advantageous, when forming part of a system of works placed in the bed of a river, several concomitant circumstances are necessary, which are not often
223 found combined. In the first place, the river would have but little fall in proportion to its length, as the contrary circumstance would, by requiring the dams across its course to be often repeated, involve an expense disproportionate to the object. 2d. Circumstances should be such as to afford occasion for the employment of some more economical moving power than human labor. 3d. The bed of the stream should afford sufficient foundations to give the necessary solidity to the works placed in it. 4th. The river should not be at any time sufficiently charged with alluvial matter to endanger the frequent filling up of the locks and their accessory parts, and thus occasion a constant expense. 5th. The banks should be so formed that the erection of dams would not occasion extensive inundations, to the injury of adjoining property.

In all these particulars, the Monongahela river is well adapted

to the mode of improvement now under consideration. 1st. Its descent from Brownsville to Pittsburgh, as has been already mentioned, is, at low water, only 30.6 feet in a distance of 55 miles, or less than 6¾ inches to a mile. 2d. The abundance of fuel, both wood and coal, render the use of steamboats the most economical and efficient means of transportation that can be employed. 3d. The bars in the stream are mostly composed of gravel brought down by the lateral tributary streams, and deposited immediately below the mouth of each. This gravel is occasionally mixed with rock or loose stone, but affording, in every instance, a sufficient foundation for locks and dams. 4th. From the character of the rivers which unite to form the Monongahela, and of which a sketch has been given
224 in the preceding pages, the quantity of alluvial matter brought down by this river is comparatively small; not enough certainly to apprehend any serious effects from it. 5th. From the description also given above, it is seen that the immediate banks of the river rise so directly from the water's edge, to the height of 30 to 40 feet, that the present high freshets produce only very partial inundations, which would not be increased, it is conceived, in any perceptible degree, by such dams as are herein proposed to be placed across the stream. Such being the circumstances favorable to the erection and preservation of this species of improvement, let us now examine what would be the effect on the navigation, when executed. For this purpose, let us consider the river at different stages of the water. At present, the quantity of water in the Monongahela, is, for a large portion of the year, not large enough to afford a sufficient depth on the bars for the passage of steamboats even of the smallest class, and scarcely enough for the keelboats, which, pushed or dragged along by the labor of a number of men, often with the assistance of teams, supply their place. If, on the other hand, a system of locks and dams were executed, we should behold steamboats of 100 tons, or larger, if desirable, urging their way swiftly, but steadily, through the nearly still water, with only the occasional interruption of a few minutes in passing a lock, the slightest knowledge being sufficient to prevent any anxiety regarding danger from either bars, snags, or sawyers. At a medium stage of water, nearly the same cir-
225 cumstances would take place, except that the current would be more rapid; but, at the same time, the water would everywhere be deep enough to permit any part of the river to be sailed over at pleasure. At high water, the case would be somewhat different. As the rise of the freshets is too great to admit the works to be raised to such a height as to place them beyond the reach of being, at times, overflowed, in such case, the locks would be no longer serviceable. The dams, then, would not, if properly planned, form an obstruction, but would permit the passage over them, of any boat or raft descending with the current, or of any ascending steamboat possessing sufficient power to stem it. In such a state, the river would preserve very nearly its present character in similar circumstances, presenting all the facilities and difficulties which it now offers when swollen by freshets. . . .

The fall of the river from Brownsville to Pittsburgh, taken at the

surface of the water at a low stage, we have seen to be 30.6 feet. This fall it is proposed to overcome by 8 dams, having locks in them from 4 to 4½ feet lift each, except the lower one near Pittsburgh, which it has been deemed expedient, on account of peculiar circumstances, to make of a lift of six feet. The height of the list is here meant as measured from the surface of one pond to that of the pond above, taken at low water. The sum of the lift of all the locks being 36½ feet, is intended to form a convenient additional depth of water for a harbor at Brownsville."

Counsel for defendant objected to said offer:

226 First. As incompetent; Second, as irrelevant, in that there is nothing to show that anything was ever done in pursuance of the document, and all that the report recommended was that other steps be taken, and no other steps ever were taken, so far as appears; Third, as not rebuttal; and Fourth, that the Act of Congress makes no provision; it is simply a contemplation.

The court overruled said objection stating its reasons as follows:

"My idea, gentlemen, upon that subject is this: If a person or company located a bridge over a tide water creek, for instance, it would be very plain there that that was a natural navigable water, over which the Government, if it did not at the time exercise any direct authority, might at any time do so. The conditions would be such that a person so locating a bridge would have to take notice of them. On the other hand, to put an extreme case, in a bridge crossing a stream, even of some magnitude, away in the interior, there would be nothing suggested of any possibility of that kind. But between those extremes there is a debatable ground, and it is a question whether we are not on that debatable ground here. The Government has in the end found occasion actually to improve this stream, and thus to bring it within the navigable waters of the United States, which are subject to the direction and control of the general Government. And one question which I think the jury must pass upon is, whether, when this bridge was erected, that could be reasonably apprehended; and, as bearing upon that, I think this report is admissible."

227 To which ruling and overruling said objection, and admitting said evidence, defendant duly excepted and exception was noted.

Counsel for the United States then offered in evidence an Act of the General Assembly of Pennsylvania approved April 2nd, 1822. This offer was for the purpose of showing the improvement of the navigation by the State of Pennsylvania, above the defendant's bridge, and before the date of its construction, and of rebutting the testimony that no improvements or aids to navigation were contemplated either by the state or the United States prior to the construction of this bridge. Said Act provided: (Act of 1822, P. L. 135-138):

"An Act to improve the navigation of the River Monongahela.

SECT. 1. Be it enacted by the State and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That Solomon Kripps, and Joseph Enochs, of Fayette County, and William Leckey, of Pittsburgh, be, and they are hereby appointed commissioners who shall have power, and it shall be their duty to cause to be removed all obstructions which impeded or injure the navigation of said river Monongahela, by making a slope or inclined navigation from the Virginia state line, to its junction with the Allegheny river, and said improvement to commence at the mouth of Dunlap's Creek, in Fayette County, and for that purpose to employ suitable persons to perform said work.

228 SECT. 2. And be it further enacted by the authority aforesaid, That ten thousand dollars of the stock subscribed by the Governor on behalf of this commonwealth, in the stock of the Monongahela Navigation Company, be, and is hereby appropriated to defray the expenses of removing the said obstructions."

To which offer counsel for defendant objected, First, that the evidence is not proper rebuttal evidence; Second, that it is irrelevant, if it is proposed to show that anything different was done under and in pursuance of the Act of Pennsylvania referred to; Third, that the Government can claim no rights under or by reason of any state statute in this proceeding.

The court overruled the defendant's objection for this reason:

The thing that is in my mind, that moves me to this ruling, is this: Here is evidence that the question of the improvement of this river was being agitated before this bridge was set up; and that that bears upon the question whether a person, in locating a bridge there, could have reason to apprehend that at some time this river might be improved in this way; or, putting it perhaps, a little more definitely, whether, by its natural situation and condition, it might be presumed to be at some time a waterway of the United States."

To which ruling overruling defendant's objection and admitting said evidence, defendant duly excepted and exception was noted.

229 Captain THOMAS M. REES, a witness called on behalf of the United States, in rebuttal, testified to the following effect:

I live in Pittsburgh and am a manufacturer of steamboats and steam-boat engines and general contractor. I have been in the trade since 1857. I have built boats for nearly every river in the United States, including the Monongahela River.

I consider the book "History of American Steam Navigation," by John H. Morrison, the best authority on steam-boats that I know of. The copy of the book shown me is a revised edition, published in 1903. John H. Morrison lives in Brooklyn. I do not know how old a man he is, or whether he was ever in Western Pennsylvania.

"Q. Do you know of anybody else who has one of these books?

"A. I think the publishing company, and the papers have.

"Q. The only two people you know of are the people that publish it and the Carnegie Library in Pittsburgh?

"A. I don't know whether Carnegie Library *Library* has one or not. This is the only one I have."

Counsel for the United States then offered in evidence the book entitled "History of American Steam Navigation," for the purpose of showing that steam boats were a practical utility before this bridge was built, and that any one building a bridge across a navigable water of the United States should take notice of this improved style of navigation; and further more to show the kind of boat navigation on the Monongahela river prior to and at the time of the construction of this bridge; and proposed to read page 19 and
230 subsequent pages, giving a history of steamboat navigation in 1806, referring to the first steam boat built by Robert Fulton; and also page 204, where reference is made to a building of a boat at Bridgeport, Pennsylvania.

The passage on page 204 of said book was as follows:

"The 'Enterprise' was built at Bridgeport, on the Monongahela River, during the spring of 1814, for the New Orleans and Pittsburg route. This was a stern-wheel boat of 80 feet in length and 29 feet beam, fitted with mast and sails, as were the steamboats of this date; but during the winter of 1814 the sails and rigging were laid aside. She was owned by parties at Brownsville, Pa., and was fitted with an engine constructed by D. French, under his patent, who had built one for the 'Comet' in 1813. On her trial trip she attained a speed of three and one-half miles per hour against the current of the Monongahela River. She made two voyages to Louisville in the summer of 1814, and in December, of the same year, conveyed a cargo of ordnance stores from Pittsburg to New Orleans.

. . .

There was launched at Bridgeport, Pa., in the summer of 1815, the 'Despatch' owned by the 'Monongahela & Ohio Steamboat Company, the same parties who owned the 'Enterprise.' Her engine was designed and constructed by D. French of Pittsburg, Pa., and was intended for a fast boat of that day, but whether she ever fulfilled the expectations of her owners, there is no record."

231 Counsel for defendant objected to said offer, First, as irrelevant and immaterial. Second, as incompetent, the book not being properly proven and the evidence showing that, so far as the witness knows, this may be the only copy in existence outside of those in the possession of the publishers: Third, that the book was only published in 1903, probably after Captain Sibert's original report condemning this bridge.

The Court overruled defendant's objection, and admitted said book in evidence, and permitted counsel for the United States to read therefrom the passages specified in said offer; to which ruling defendant duly excepted and exception was noted.

Counsel for the United States offered in evidence certain maps for the purpose of showing a proposed slack water system on the Monongahela River prior to the building of defendant's bridge. Counsel for the United States stated that the map purported to be

made by William Howard, U. S. Civil Engineer, by Ch. W. Angler, Mss. Agt.; Civil Engineer John W. Smith, E. W. Robinson, by J. W. Smith; that the aforesaid William Howard was the same person who had made the report on the improvement of the Monongahela River between Brownsville and Pittsburgh; and that the maps were made in pursuance of that report; that the survey was made in 1832; and that the maps were produced from the records of the Engineer's office in Pittsburgh. Counsel for the defendant objected to said offer because—

First, there was no proof of the maps;

Second, that the maps show that they only extend from Pittsburgh to Brownsville;

Third, that they show on their face that they were made in 1834, which was after this bridge was incorporated and
232 built.

The court overruled said objection and admitted said maps in evidence, to which ruling defendant duly excepted and exception was noted.

Major W. L. SIBERT recalled as a witness in behalf of the United States in rebuttal, and shown the maps just submitted, in evidence, testified to the following effect:

The endorsement on the map states that it is a portion of the profile of the Monongahela River, showing proposed locks and dams from Pittsburgh to Brownsville, made on April 16th, 1834, by William Howard, U. S. Civil Engineer.

"Q. I will now ask him what dams it shows.

"A. Well, the last dam that is shown on this map is about two miles below Brownsvile, and this dam has a lift of about eight feet; measured on the scale on the map, it produces, as shown on this profile, eight or ten feet depth of water under this bridge; and of course that same pool would extend with slack water considerably above Dam No. 5 as it exists to-day on the Monongahela River.

. . .

"Q. There is not an endorsement upon any one of these plans that indicates in the slightest way that it was made by the United States Government, or by its authority, is there?

"A. It purports to have the original signatures of the Gentlemen named.

"Q. But they were not, in point of fact, officers of the United States Government?

"A. The signatures so state.

"Q. Do you know where these plans came from?

"A. I found them as part of the records that I found when I came here.

233 "Q. When did you come here?

"A. I came here about five years ago.

"Q. About 1901?

"A. Yes, sir. . . .

"Q. You have in your office plans and surveys that were made for

the Monongahela Navigation Company, and all the plans of that company, haven't you?

"A. We have some.

"Q. Now you say those papers are signed by these gentlemen as officers of the United States?

"A. Yes.

"Q. I call your attention to the plan coming up to Brownsville, and I will ask you where there is, under the signatures on that plan, anything to show that the survey was made by anybody?

"A. Well, here is the profile.

"Q. I am asking you to answer my question. Under the signatures on that paper, where do you find anything to designate those gentlemen as officers of the United States Government?

"A. In that same way, you have Mr. William Howard's signature, purporting to be——

"Q. He simply calls himself Civil Engineer.

"A. Well, that's the same name that is signed to the official document.

"Q. Will you kindly look at the signatures of the gentlemen that purport to make the plan, and isn't it a fact that they don't purport to be United States officers at all?

234 "A. Well, there is James S. Agnew, U. S. Civil Engineer.

"Q. United States Civil Engineer, doesn't at all mean that a man is an officer of the United States Government, does it?

"A. It does, certainly.

Mr. DUNKLE:

"Q. That is the same name that appears on the Executive House Document?

"A. It is the same name.

THOMAS B. ROBERTS, called as a witness on behalf of the United States in rebuttal, testified to the following effect:

I live in Pittsburg and am assistant to the United States Engineer: I came into the service of this United States Engineering District in 1897, at the time the locks and dams of the Monongahela Navigation Company were purchased by the United States, and these maps were in the United States Engineer's office at that time. I was chief engineer of the Monongahela Navigation Company, and I brought with me a number of the plans and sketches and so on that were the property of the Navigation Company and presented them to this office.

These maps just offered in evidence were not in the office of the Monogahela Navigation Company, and were not among those that I presented to the United States Engineer's office. They show a survey of that part of the Monogahela River which the Monongahela Navigation Company improved about seven years later with a different system of locks from that shown in these maps.

235 I am nearly 64 years old and was acquainted with the Monongahela River before it was slack watered by lock No. 4. Lock and Dam No. 4 when originally constructed, slacked the

water to a point several miles above Brownsville, and raised the water at the defendant's bridge so that it had a depth of four or five feet.

"Q. From your knowledge of the upper Monongahela at what natural stage of the river could steam boats safely proceed from Brownsville to points in West Virginia?

"A. I think with about four or five feet of water they could proceed with safety over the old bars and dams, fish dams and things that existed in that river.

"Q. Did the construction of Dam No. 4 materially change the clearance under the bridge in question when the river was, either naturally or artificially, at its lowest navigable stage?

"A. No, sir, it did not and it does not.

"Q. Then, as I understand, when the river was navigable before the dam was built, there existed the same clearance at this bridge as existed after it was built?

"A. Yes, sir. . . .

"Q. Above the lowest navigable stage, did the dam materially change the clearance under the bridge?

"A. No, sir.

"Q. Are you acquainted with the plans for the locks and dams on the Monongahela River as originally constructed by the Monongahela Navigation Company?

"A. Well, I think I understand those plans. The dams were built before I was born; Dam No. 4 was — about the year I was born.

236 "Q. Were you a Chief Engineer for that Navigation Company?

"A. Yes, sir; for about fourteen years.

"Q. Now, do you know definitely, or approximately, the depth of water contemplated to be got on the lower sill of Dam No. 4 in the Monongahela River at the time of its building? . . .

Mr. BEAL: What does this refer to?

Mr. DUNKLE: If I remember, you introduced testimony with regard to the dam being raised two feet, and it is to meet that that I ask this. . . .

"A. I have torn down and rebuilt portions of Dam No. 4 at different times, and I have seen the elevation of the crest of that dam, and I know it has settled at various dates out near mid river, and especially over towards the abutment; and then the Navigation Company kept raising it up. And I have seen the old original timbers taken out, and the indications all showed how the old structure had settled down. The wall was built, apparently, according to indications in opening that dam and looking at it, about eight feet below the top of the lock walls or the crest of the dam level. And below there had been a great settlement in the dam; but the Navigation Company kept rebuilding, in order to hold the water."

On cross-examination:

"Q. When did you first have any personal knowledge of
237 Lock and Dam No. 4—I mean of a definite character?

"A. Well I might say in 1884. I had been there, though, before and seen it.

"Q. In other words, your first definite knowledge of that Lock and Dam began forty years after the thing was built? That's right, isn't it?

"A. Yes, sir.

. . .

"Q. When did you make this examination, in which you said you took out these old walls, and from which you say what you have said with reference to the construction of dam and Lock No. 4? It was since the Government took them over, wasn't it?

"A. No, sir.

"Q. Well, when was it, then?

"A. Well, I suppose about eighty-six. I know we did important work in rebuilding portions of that dam in '88. That's one year.

"Q. So that, this examination, upon which you base your testimony, was made about forty-five years after the work was done—isn't that right?

"A. As far as that goes, yes.

"Q. And you have absolutely no personal knowledge whatever as to how far, in point of fact in 1844, when the dam was built, it actually did slack water the river, have you? You were only two years old then? Isn't that right?

"A. Well, could I speak of my sources of information?

"Q. I am not asking for sources of information. But I am asking you if you don't say to this jury that you have, apparently, no personal knowledge whatever as to what the distance was
238 that that dam slack watered the river in 1844, when it was built?

"A. I have knowledge of what it was about 1852 and 1853.

"Q. Will you kindly answer my question? Do you mean to say to this jury that at the age of two years, you were able to tell how far that dam slack-watered the Monongahela River?

"A. No, sir."

Counsel for the United States then read to the jury an extract from a letter included in the communications between Brigadier General Charles Gratiot Chief of Engineers, U. S. A. and Lieutenant J. K. F. Mansfield, Corps of Engineers, relating to repairs on the National Pike, which communications had previously been offered in evidence by the defendant.

Said extract is as follows:

ENGINEER DEPARTMENT, *July 23rd*, 1832.

To Lt. J. K. F. Mansfield, Corps of Engineers, Washington, D. C.

SIR: By direction of the Secretary of War, you have been assigned, temporarily, to the superintendence of the repairs of the Cumberland

Road, east of the Ohio river; and in the discharge of your duties in this capacity, you will be governed by the following instructions.

1st. Respecting the parts to be repaired. The extreme limits within which your operations will be confined are, the point of intersection of the road with the western boundary line of the State of Pennsylvania, and Cumberland, in the State of Maryland; the dividing line between these States will be considered as dividing the line of the road to be repaired, into two divisions, and the division within the State of Pennsylvania will be subdivided into six equal sections, and that within the State of Maryland into two: then, having made a thorough examination of each of these sections, with a view to make yourself acquainted with their exact condition, you will classify them in the order of their condition, placing the worst first, the next worst second, and so on, making the best, the last. You will then make an estimate for the repairs of each of these sections to ascertain how far the appropriation, which is one hundred and fifty thousand dollars, will go toward repairing the whole road. Separate contracts will then be made for executing the repairs, commencing with No. 1, and passing regularly through the sections as classified, to the best section; and these repairs will be prosecuted with as much despatch as the nature of the case will allow. Should you deem it advisable in letting out these sections, to retain any portion of them which may seem to require but slight repairs, and which repairs could be executed with greater economy by hiring overseers and laborers to act under your immediate direction, you are at liberty to do so, bearing in mind, however, that whenever the repairs of the road can be made with equal economy, it is the wish of the department that they should be made by contract. As soon as one or more of these sections are finished, you will notify the commissioners appointed to receive this road by the laws of Pennsylvania and Maryland, approved, that of the former on the 4th of April, 1831, and that of the latter on the 4th day of January, 1832, that these sections are ready to be turned over to the State, and you will accordingly turn them over.

(Signed) C. GRATIOT, *B. Gen'l.*"

Counsel for the United States also read to the jury the following extract from page 255 of the book "The Old Pike; A History of the National Road," by Thomas B. Searight, which book had previously been offered in evidence by the defendant:

"The next point is Brownsville, for many years the head of steamboat navigation on the Monongahela river. Here many passengers were transferred from the stage lines to the steamboats plying between this point and Pittsburg. It is shown by official figures that from 1844, the date at which the slack water improvement was completed to Brownsville, to 1852, when through business ceased on the National Road, covering a period of eight years, more than two hundred thousand passengers left the stage lines at Brownsville and took passage on the Monongahela steamers. West-going passengers were 'ticketed through' from Cumberland, Baltimore, and other points east, to Pittsburg, and other points west, via the National Road and the Monongahela river route. A movement was set on

foot as early as the year 1814, looking to the improvement of the navigation of the Monongahela River by means of locks and dams, followed by later spasmodic efforts, but nothing of a practical nature was accomplished in this direction until 1836, when a company was incorporated to carry forward and complete the work."

241 The United States then rested.

The foregoing constitutes a statement of all the testimony offered and admitted upon the trial of this cause.

242 Thereupon counsel for the defendant requested the court to rule and instruct the jury in accordance with the following points of law:

1st. The authority conferred upon the Secretary of War by Section 18 of the Act of March 3, 1899, to require any bridge constructed across any navigable water of the United States, which is an unreasonable obstruction to navigation to be so altered as to render navigation reasonably free, easy and unobstructed, applies only to bridges constructed under the authority of Acts of Congress which reserved such power to Congress.

Answer. Refused.

To which answer the defendant excepted, and exception was noted.

2nd. The question whether the bridge was so constructed as unreasonably to interfere with the navigation of the river was to be determined by the requirements of navigation at the time when the bridge was erected, and was not made dependent upon the interest of future navigation, and Congress could not compel the alteration of such bridge then properly constructed, at the expense of the bridge owner, and without compensation, merely because it might under the views of the Secretary of War, in the future be an unreasonable obstruction to some new and improved method of navigation.

Answer. Refused.

To which answer the defendant excepted, and exception was noted.

243 3rd. The Monongahela Bridge having been erected under a statute of the State of Pennsylvania, granting the Bridge Company such power, and with the acquiescence and assent of the United States Government, and prior to the Congress of the United States having assumed jurisdiction over said river, it became a lawful structure and the lawful property of the Monongahela Bridge Company, and the United States cannot deprive the Bridge Company of that property without due process of law, including compensation for the loss of the Bridge Company.

Answer. Refused.

To which answer defendant excepted and exception was noted.

4th. The requirement by the Secretary of War in his order for the reconstruction of the Monongahela Bridge, which compels the removal by the Monongahela Bridge Co. of the present structure and the erection of a new one, is a virtual taking of the property of the Bridge — by the United States without due process of law, and therefore in violation of the Federal Constitution.

Answer. Refused.

To which answer defendant excepted and exception was noted.

244 5th. The requirement of the Secretary of War in his order compelling the reconstruction of the bridge at the expense of the Bridge Company, and without compensation to the Bridge Company, is a virtual taking of the property for public use without just compensation, and is therefore in violation of the Federal Constitution.

Answer. Refused.

To which answer defendant excepted and exception was noted.

6th. From the evidence in the case the Jury may find that the United States both by its Executive and legislative Departments, invited, acquiesced in and approved of the erection of the Monongahela Bridge as it now stands, and if they so find and also find that the Government made it a part of the National highway, and it was used as such, the defendant cannot be compelled by the order of the Secretary of War to change the said bridge and alter the same at its own expense as is provided in said order, because that would be the taking of the private property of the defendant without due process of law, and without compensation.

Answer. Refused.

To which answer defendant excepted and exception was noted.

7th. This information being based upon a non-compliance by the Monongahela Bridge Company with the order of the Secretary of War, which order it is alleged was made under the provisions of the Act of Congress approved March 3rd, 1899, cannot be main-

245 tained, because in respect to these proceedings the provisions of said Act are null and void, for the following reasons:

(*a*) It attempts to take and destroy the private property of the Monongahela Bridge Company without due process of law, contrary to the provisions of the Constitution;

(*b*) It undertakes to authorize the taking and the destruction of private property for public use without just compensation, contrary to the provisions of the Constitution;

(*c*) It undertakes to unlawfully delegate to the Secretary of War of the United States and to the Chief of the Engineer Corps of the United States Army, both legislative and judicial powers, and this in contravention of the Constitution of the United States;

Answer. Refused.

To which answer defendant excepted and exception was noted.

8th. The said Act of Congress makes it the duty of the Secretary of War to first give the party reasonable opportunity to be heard, and to give notice to the persons or corporation owning or controlling such bridge (in this case the Monongahela Bridge Company) so to alter the same as to render navigation through or under it reasonably free and unobstructed, and in giving such notice the Act requires him to specify the changes recommended by the Chief of Engi-

246 neers that are required to be made, and the Secretary of War shall prescribe in each case a reasonable time in which to make such changes. Under this Act the Secretary of War was required affirmatively to give to the Monongahela Bridge Company, the owner of the bridge in controversy, an opportunity to be heard by him, the Secretary of War, on the questions whether the bridge was

an unreasonable obstruction to navigation and what alterations shall be made, before he was authorized or lawfully empowered to give the notice and make the order he did to the Monongahela Bridge Company, requiring the alteration of said bridge, and it appearing affirmatively that the Secretary of War in making the order set forth in the information, never at any time gave the Monongahela Bridge Company reasonable opportunity to be heard before him, or any hearing whatsoever, therefore, the said order is not a lawful one, and this prosecution must fail.

Answer. Refused.

To which answer defendant excepted and exception was noted.

9th. That under the evidence in the case it is for the Jury to determine whether the Monongahela Bridge is an unreasonable obstruction to navigation of the Monongahela River.

Answer. Refused.

To which answer defendant excepted and exception was noted.

247 10th. Conceding that Congress might by direct Act declare the Monongahela Bridge an unreasonable obstruction to navigation, the United States has failed to show that Congress ever has taken any such action, or has ever disapproved of the bridge as constructed.

Answer. Refused.

To which answer defendant excepted and exception was noted.

11th. The evidence showing that Captain Silbert, without affording the Monongahela Bridge Co. an opportunity to be heard, first examined and then reported that the bridge was an unreasonable obstruction to navigation and the matter was then referred back to Captain Silbert to grant the Monongahela Bridge Co. a hearing—does not show such a hearing as the Act of Congress provides for, and the fact that the Bridge Company appeared before him will not alter the case, as it is not shown that the Bridge Company knew the fact of his previous examination and report.

Answer. Refused.

To which answer defendant excepted and exception was noted.

12th. Under all the evidence in the case their verdict must be for the defendant.

Answer. Refused.

To which answer defendant excepted and exception was noted.

248 13th. The Government cannot as in this case destroy the property of the Monongahela Bridge Co. by delegating to the Secretary of War or the Chief of Engineers power to make the order which was done in this case, nor enforce the same through the Federal Courts, without giving the Bridge Company an opportunity to defend on the ground that the bridge is not an unreasonable obstruction to navigation.

Answer. Refused.

To which answer defendant excepted and exception was noted.

Thereupon Counsel for the United States requested the court to

rule and instruct the jury in accordance with the following points of law:

1st. By Section 18 of the Act of March 3rd, 1899, (30 St. 1153) Congress placed on the Secretary of War the duty of determining whether or not bridges over natural waterways of the United States were obstructions to the navigation of such waterways. In case he complied with the requirements of the law in regard to a hearing, and fixed a reasonable time for the completion of the prescribed alterations, his notice to alter the Monongahela Bridge, set forth in the Information filed at above number and term, was a lawful notice, and the failure to alter said bridge in accordance with said order, or to move the said structure, if continued during the month of September, 1905, constituted the misdemeanor charged in the Information; and though the defendant originally built said Monongahela Bridge under color of authority of an Act of Assembly of the State of Pennsylvania, and even though the requirements
249 of that Act of Assembly were strictly observed by said Bridge Company in constructing said bridge, such act of assembly would not constitute a valid defense to the information.

Ans. That is a correct statement of the law.

To which answer defendant excepted and exception was noted.

3rd. Section 18 of the Act of March 3rd, 1889, directs the Secretary of War to give parties interest-, to-wit, the bridge owners, a reasonable opportunity to be heard, prior to issuing final notice to said bridge owners, to make the alterations deemed necessary by him in order to render the bridge under consideration not an obstruction to the free navigation of the river spanned by it. Such hearing need not be held by the Secretary of War in person; and it is sufficient under the provisions of the act if the Secretary of War had given said owners an opportunity to be heard relative to the proposed alterations before one or more of his agents or subordinates, and the testimony or statements made at said hearing have been submitted to and considered by the Secretary of War.

Ans. That is a correct statement of the law.

To which answer defendant excepted and exception was noted.

The Court also charged the jury as follows:

250 "GENTLEMEN OF THE JURY:

This is an important case, and the duties that you are called upon to perform, in connection with it are certainly somewhat out of the ordinary.

On the one hand is the general Government claiming that the defendants, in refusing to comply with the order of the Secretary of War and make changes to correspond in their bridge, have brought themselves within the law and have committed an offense against it, making them liable to punishment therefor.

On the other hand, the defendant Company sets up, as justification for its refusal, the protection of the Constitution of the United States, claiming that the order will unjustly deprive them of their property, and that they are entitled to have compensation provided before it shall be done.

The charge, as it is presented here, assumes the form of a criminal charge. It is the same as though the Bridge Company were under indictment, and your verdict will be guilty or not guilty.

The authority of the Secretary of War to act as he has done in the premises cannot be questioned. Congress, by the Constitution of the United States, is given general authority over foreign and interstate commerce, and, in that connection, has control over such water-ways of the Nation as may be drawn into interstate commerce, or may be used for that purpose.

Provision, therefore, has been made, that when, in the judgment of the Secretary of War, there is an obstruction to such
251 navigable waters, he, after giving notice to the parties and affording them an opportunity to be heard, may make an order requiring the removal or the change of such obstruction, specifying what changes shall be made and within what time it shall be done.

All that has been pursued in this case, and the regularity of what has been done by the Secretary of War is not now open to question. It must be accepted and complied with, unless a sufficient reason has been given in the position taken by the defendants for not complying with it.

By the slack water improvement of the Monogahela River extending above and below this bridge, it is now located on what has been adopted as a part of the navigable waters of the nation devoted to interstate commerce, and the bridge having been pronounced in this way, by due authority, to be an obstruction, that is the end of that matter.

The law evidently intends that a failure to comply with any such order shall be punished in such a way that it will be for the interests of parties to comply. A maximum fine of $5,000 is directed to be imposed; and every month that the parties may fail to meet such order constitutes a new offense. So that you would have offense upon offense and fine upon fine to such an extent that parties would hardly be able to hold out against it.

So there is no question in this case for you to decide as to whether or not this bridge is an obstruction, or whether or not the
252 changes shall be made by which the obstruction that it now presents shall be removed.

The only question which is before you is whether or not the defendants are entitled to ask that the expense of this, instead of falling upon themselves, shall be borne by the General Government. And upon that, upon their right to make that demand, depends the question whether or not they are to be pronounced guilty or not guilty of this charge.

The Constitution says that private property shall not be taken without just compensation, and that no one shall be deprived of his property except by due process of law.

Let us look, then, in the consideration of this case, at the question, What would be the effect of a compliance by the Bridge Company with this order?

There can be little doubt as to that in your minds, as it seems to

me, under the evidence that has been given. By that which has been required to be done, this bridge must practically be torn down, according to the evidence of Mr. Morse, whose testimony does not seem to be controverted. The present clearance of the bridge, I believe, is about forty feet, and the requirement is that it shall be made twelve feet higher. Also that the channel span shall be about four hundred feet. Mr. Morse testifies that he has made plans and estimates, and that, according to them, the present structure would have to go—there can be no doubt about that—and a new one put up.

253 As the matter stands, this bridge represents, according to the testimony of Captain Lenhart, an investment of about $65,000 or $70,000, on which they are getting a net return of some $9,000 or $10,000 a year.

The old bridge has an apparent life of some twenty years yet. To make a new bridge, a steel structure, which would probably be the one adopted, according to the testimony of Mr. Morse, would cost some $112,000, including the expense of removing the old and making the changes in the abutments, and also allowing a salvage in the demolition of the old one, for the timber that is in it.

Now, does that amount to a taking, within the provision of the Constitution? It seems to me that if it causes a substantial or serious destruction of the property which the defendants now hold and enjoy, it does come within this provision of the Constitution. The defendants have apparently got to see $65,000 wiped out and $112,000 more put in out of their pockets, if they are to maintain this structure as a toll bridge. It is true that the franchise which they have for taking toll would not be interfered with. They may still put up another bridge, in other words, and get toll from it. And they must, in the end, some day put up such a structure, no doubt, when this one wears out. The new bridge, also, would be up to date and would have that advantage, with all the new life that was in it.

But, at the same time, taking all this, taking the net result, and especially the immediate result to these parties, if this would be a substantial loss to them, it amounts, in my judgment, to a

254 taking within the provisions of the Constitution for which under ordinary circumstances, compensation must be made.

The question, then, comes down to this: whether the bridge has a right to be there, under all the circumstances that are found in the case. I have already said to you that Congress has complete control over the navigable waters of the United States. This, as it now stands and according to the improvements which have been made, is one of the navigable waters. This bridge has been found to be an obstruction, and may be ordered to be removed. All these are fundamental facts that must be accepted. And the question is, Why, then, must not the defendants comply?

It seems to me that I can illustrate what I desire to present to you upon this by taking extreme cases. There can be no question, in my mind, if a person undertook to locate on what was clearly a navigable water of the United States, by putting up, for instance,

a bridge which spanned it, that, unless the assent of Congress were first secured, he would do this subject to the right of Congress to come in and say that it should be removed. If this were done on a tide water creek along our sea coast, no controversy as to the right of Congress to come in, in this way, could arise; nor, if a bridge were located across any of our important rivers, such as the Ohio, or such a the lower reaches of the Delaware and the Susquehanna, in the eastern part of this state, or such, for instance, as the Allegheny and Monongahela right here at their confluence, now, after the improvements in navigation which exists have been made.

255 On the other hand, suppose a party located a bridge upon some stream quite a way in the interior, across some inconsiderable creek or stream, with no suggestion at all about it of any possibility of a use of that stream, either in its natural condition or under any probable improvement of it—there, it seems to me, we would have the opposite case; and a party could not then be charged with intruding on a navigable water, such as in any likelihood would ever come under the authority of Congress to be a navigable waterway; and that he would be protected, if he had due authority from the State, or under any circumstances; and that he could invoke this provision of the constitution of the United States for his protection.

But this case, unfortunately, is not so clear as all that. It occupies a middle position. It is nearer the line. One distinguishing feature of it is, however, that the navigation of this stream, as it is now conducted, is not natural, but artificial—that is to say, in its present proportions. Congress, taking up the work that was begun under the State law, has improved the Monongahela River by the location of locks and dams, carrying slackwater away into the interior of the country, extending up not only through Pennsylvania, but into the neighboring state of West Virginia. We have, therefore, here an interstate navigable stream, as it stands, and on this is this bridge which, under these conditions, has become an obstruction, according to the judgment of the Secretary of War.

256 But Congress, by direct action, has made these conditions—as they now exist, at least—and that gives the case a different feature from the ordinary. Can that be done on the part of Congress, either by an adoption of what had already been done under the State law, or by carrying the same improvements forward, can that be done in that way and this property taken in order that the work may be complete and meet all the requirements without the parties whose property is so taken being entitled to invoke the protection of the Constitution?

It seems to me, then (and I have so ruled in the course of this case), that we have got to consider what were the natural conditions of this stream and what was reasonably to be apprehended therefrom at the time this bridge was constructed.

Was this by nature a navigable water? Now, we have the legislatures of both Pennsylvania and Virginia in the early days declaring that this stream was a navigable stream. That bears somewhat on the question; but, at the same time, we must have something more

than a mere legislative declaration, in my judgment. And this, as you will note, was merely with regard, apparently, to matters within each of these respective states, not necessarily extending to interstate navigation, where alone Congress comes in.

You have heard the testimony of these witnesses; and old historical matters have been referred to, bearing on the question as to the character of the use of this stream. On the one hand it is con-

257 tended that boats and rafts passed up and down; and while it is conceded at certain seasons of the year, perhaps in very low and dry times, this may not have been done, yet, nevertheless, it is claimed, that during the major part of the time this was made use of and actually was a navigable water. On the other hand it is contended, and testimony has been given to the effect, that this stream through a large portion of the year consisted merely—at least, near this bridge, as well as up beyond it—of pools with intermediate riffles; that the boats that went down the river only got back by pushing, by poling, or in some cases by putting out lines and drawing up the boats by means of a windlass. Poling and pulling in this way hardly seems to me to constitute navigation? It is in one sense such; but looking at it in the broader sense, and having regard to the fact that the right of Congress to act depends upon the stream being navigable for the purposes of interstate commerce, was that such as existed here?

If you find, however, that, taking these legislative declarations that have been shown to have been made with regard to this stream, this actually was what might be regarded as navigable water over which Congress, in the exercise of its authority, would have proper jurisdiction, then when the parties set up their bridge, they took subject to that condition, and they cannot complain now that it is enforced against them.

258 I am prepared to go one step further, and testimony has been received upon that theory, and that is, that if, when this bridge was erected the parties who built it had reason to apprehend that there would be such character of improvements, as have actually now come about, they would also be affected with notice of that, and bound by it.

Now, upon that question, we have several things upon the one side and the other. It is true that, not until 1836, was the Monongahela Navigation Company chartered, and this was some three years after this bridge had been built. Nor were there any locks and dams on the river at all until 1840 and '41, when Dams No. 1 and 2 were built; and not until 1844 were Dams 3 and 4 constructed, by which the slack water was brought up to Brownsville. So that up to the time of and several years past the time when this bridge was erected there, there was nothing but the stream in its natural condition, with these impediments in it such as have been described here, if you believe that testimony.

At the same time, we have evidence that, even at that early day and before it, slack water improvement of this river had been contemplated, and that, too, not only by the State government, but by the National Government. United States engineers had, previous

to this time, according to maps which were here produced and put in evidence, made a survey of this stream, looking to just such
259 improvements as are now found upon it. We have also the fact that the lower reaches of the Monongahela River, as it approaches here to the confluence with the Allegheny and Ohio, by that very fact was brought in touch with the general navigation of the country. I do not know, at that early date, just how far up the stream there was navigation, but I imagine that from the very earliest here about Pittsburgh and down the Ohio there was such use of the river, that there were such river craft plying up and down and about here, that the Monongahela at this lower part of it was already devoted to interstate navigation. And this bridge was only about fifty miles off. And was it to be reasonably apprehended, under all these circumstances, that this stream, by such improvements as were so suggested, might become a highway such as it has now become?

If you should find that it was actually a navigable stream, which could be put to the purpose of interstate navigation, or, further than that, if that was to be reasonably apprehended by the exising conditions, then the parties who built this bridge, when they erected it where they did, took with notice and subject to such conditions and to the control that would ultimately result therefrom by Congress, under its power to control the interstate water-ways of the country.

This case, then, really, practically comes down to that—to the disposition of those two questions. The first, of course, being the question whether the charges that are required upon this bridge would amount to a taking. But, if you dispose of that question in favor of the defendants, then the case depends really
260 upon this other question—whether this was a navigable stream or water-way, or whether these parties had reason, from the conditions existing there at the time or that of which they were bound to take notice, to believe that it might be devoted to such a purpose as it now has been.

Parties who act with notice act with their eyes open. They cannot complain if the risk that they take turns against them. And it does not matter, and we cannot be turned aside by the fact, that the loss to them may be serious. We may hesitate to so declare it, or to take such action as will, put them in that position. But still, if the facts compel that result, neither you nor I must hesitate to do our duty in the premises. If these parties erected their bridge upon a navigable water, or that which they had reason to believe might ultimately become such, then they took subject to the control of the General Government to declare, as the Secretary of War in this case has done, that the use is an obstruction to the improvement that is contemplated and desired for the benefit of the people of the United States. And, under those circumstances, the defendants cannot say that somebody else shall bear the brunt of it. Whatever the loss to themselves, they must comply with this order, if this condition be true and you must pronounce them guilty on this charge.

On the other hand, if you are not satisfied upon that point, if you believe that the stream was not naturally navigable for the purposes

of interstate commerce, or that the artificial conditions which
261 now exist by which this action of the Secretary of War is
made necessary could not have been reasonably contemplated by anything that was apparent there or that had been going on, either on the part of the State or the General Government, and that the Bridge Company, acting on the situation as it was presented to them, had no reasonable ground to apprehend any such result, then they would not be answerable at this time and cannot be required to obey it until just compensation has been made, if obedience would result in the destruction of their property and the serious loss to them which has been testified to.

They must obey eventually. Mind you, that question is not open. That, they do not, or at least they cannot, pretend to set up. This bridge must be changed, if this law stands, and I see no reason why it should not. The only question is, whether it must be at their expense.

If you consider that the defense which they have made, as I have endeavored to explain it to you, is not made out, then you will pronounce them guilty. But, on the other hand, if you are not satisfied upon that point, even though the result of your verdict may apparently block the general Government, you will find them not guilty.

It is not often that a question of such administrative concern gets into a jury box to be passed upon. But the law has made you
the arbiters of that question, and you alone can pass upon it."

262 Counsel for defendant duly excepted and exception was allowed to that portion of the charge of the court to the jury which is as follows:

"If you should find that it was actually a navigable stream, which could be put to the purposes of interstate navigation, or, further than that, if that was to be reasonably apprehended by the existing conditions, then the parties who built this bridge, when they erected it where they did, took with notice and subject to such conditions and to the control that would ultimately result therefrom by Congress, under its power to control the interstate water-ways of the country.

This cause, then, really, practically comes down to that—to the disposition of those two questions. The first, of course, being the question whether the changes that are required upon this bridge would amount to a taking. But, if you dispose of that question in favor of the defendants, then the case depends really upon this other question—whether this was a navigable stream or water-way, or whether these parties had reason, from the conditions existing there at the time or that of which they were bound to take notice, to believe that it might be devoted to such a purpose as it now has been. Parties who act with notice act with their eyes open. They cannot complain if the risk that they take turns against them. And it does not matter, and we cannot be turned aside by the fact, that the loss to them may be serious. We may hesitate to so declare it, or to take such action
as will put them in that position. But still, if the facts compel
263 that result, neither you nor I must hesitate to do our duty in the premises. If these parties erected their bridge upon a navigable water, or that which they had reason to believe might

ultimately become such, then they took subject to the control of the General Government to declare, as the Secretary of War in this case has done, that the use is an obstruction to the improvement that is contemplated and desired for the benefit of the People of the United States. And under these circumstances, the defendants cannot say that somebody else shall bear the brunt of it. Whatever the loss to themselves, they must comply with this order, if this condition be true, and you must pronounce them guilty on this charge."

Counsel for defendants duly excepted and exception was allowed to that portion of the charge of the court to the jury which is as follows:

"At the same time, we have evidence that, even at that early day and before it, slack water improvement of this river had been contemplated, and that, too, not only by the State government, but by the National Government. United States engineers had, previous to this time, according to maps which were here produced and put in evidence, made a survey of this stream, looking to just such improvements as are now found upon it. We have also the fact that the lower reaches of the Monongahela River, as it approaches here to the confluence with the Allegheny and Ohio, by that very fact was brought in touch with the general navigation of the country.

264 I do not know, at that early date, just how far up the stream there was navigation, but I imagine, that, from the very earliest here about Pittsburgh and down the Ohio, there was such use of the river, that there were such river craft plying up and down about here, that the Monongahela at this lower part of it was already devoted to interstate navigation. And this bridge was only about fifty miles off. And was it to be reasonably apprehended, under all these circumstances that this stream, by such improvements as were so suggested, might become a highway such as it has now become?"

Counsel for defendant duly excepted, and exception was allowed to that portion of the charge of the court to the jury, which is as follows:

"The authority of the Secretary of War to act as he has done in the premises cannot be questioned. Congress, by the Constitution of the United States, is given general authority over foreign and interstate commerce, and, in that connection, has control over such water-ways of the Nation as may be drawn into interstate commerce, or may be used for that purpose.

Provision, therefore, has been made, that when, in the judgment of the Secretary of War, there is an obstruction to such navigable waters, he, after giving notice to the parties and affording them an opportunity to be heard, may make an order requiring the removal or the change of such obstruction, specifying what changes shall be made and within what time it shall be done.

265 All that has been pursued in this case, and the regularity of what has been done by the Secretary of War is not now open to question. It must be accepted and complied with, unless a sufficient reason has been given in the position taken by the defendants for not complying with it."

Counsel for defendant duly excepted, and exception was allowed to that portion of the charge of the court to the jury which is as follows:

"By the slack water improvement of the Monongahela River ex-

tending above and below this bridge, it is now located on what has been adopted as a part of the navigable waters of the nation devoted to interstate commerce, and the bridge having been pronounced in this way, by due authority, to be an obstruction, that is the end of that matter."

Counsel for defendant duly excepted, and exception was allowed to that portion of the charge of the court to the jury which is as follows:

"So there is no question in this case for you to decide as to whether or not this bridge is an obstruction, or whether or not the changes shall be made by which the obstruction that it now presents shall be removed."

266 The jury found a verdict in the following form:

"We, the members of the Jury in the case of United States *vs.* Monongahela Bridge Company, defendant, find a verdict of guilty."

And now in furtherance of justice and that right may be done, the defendant presents the foregoing as its bill of exceptions in this cause, and prays that the same may be settled and allowed, and signed and certified by the Judge as required by law.

D. T. WATSON,
Attorneys for Defendants.

267 In the District Court of the United States for the Western District of Pennsylvania.

No. 1, May Term, 1906, Criminal Docket.

THE UNITED STATES
vs.
THE PRESIDENT, MANAGERS & COMPANY OF THE MONONGAHELA BRIDGE COMPANY, a Corporation.

Notice of Filing Defendants' Bill of Exceptions.

John W. Dunkle, United States Attorney for the Western District of Pennsylvania:

You are hereby notified that the defendants in order to prosecute a writ of error from the judgment of the court in the above entitled cause has prepared and this day filed in the office of the clerk of the court and presented to the Honorable Robert W. Archbald, the Judge who tried the above entitled cause, its bill of exceptions, a copy of which is herewith served upon you.

D. T. WATSON,
Att'ys for Defendants.

Service of the above notice and of a copy of the foregoing bill of exceptions, accepted this 18th day of Feb'y, 1908.

JOHN W. DUNKLE.

268 Ex. 8. 11/23/'06. L. D. I.

UNITED STATES OF AMERICA.

[Vignette.]

WAR DEPARTMENT.
WASHINGTON, *October* 9, 1906.

I hereby certify that the attached tracing is a true copy of the original map of Plan of the ground near the Mouth of Dunlap's Creek—exhibiting the location of the proposed bridge on the Cumberland Road between Brownsville & Bridgeport (Pa.) as also—the old county bridge near the same position, with its approach to the Monongahela Bridge, August 4th, 1834, on file in the Office of the Chief of Engineers, United States Army.

H. F. HODGES,
Acting Chief of Engineers.

Be it known that H. F. Hodges, who signed the foregoing certificate, is the Acting Chief of Engineers, United States Army, and that to his attestation as such full faith and credit are and ought to be given.

In witness whereof I have hereunto set my hand, and caused the seal of the War Department to be affixed, on this ninth day of October, one thousand nine hundred and six.

[Seal United States of America, War Office.]

ROBERT SHAW OLIVER,
Acting Secretary of War.

(Here follows map marked p. 269.)

270 *Order.*

And now, to-wit, this 19th day of February, 1908, the foregoing bill of exceptions with the addition thereto of the map designated Exhibit S is found to be correct in all respects, and is hereby approved, allowed and settled, and made a part of the record herein.

R. W. ARCHBALD,
U. S. District Judge.

271 [Endorsed:] No. 1, May Term, 1908. Criminal docket. United States *vs.* The President, Managers and Company of the Monongahela Bridge Company, a Corporation. Defendants' Bill of Exceptions. D. Filed: Feb'y 20, 1908.

272 In the District Court of the United States for the Western District of Pennsylvania, May Term, 1906.

THE UNITED STATES
vs.
THE PRESIDENT, MANAGERS AND COMPANY OF THE MONONGAHELA BRIDGE COMPANY.

Fayette.

February 14, 1906.—On motion of John W. Dunkle, United States Attorney, for a rule on said defendants, a corporation existing under the laws of the State of Pennsylvania, to show cause why an information should not be filed by said United States Attorney, in the District Court of the United States, for the Western District of Pennsylvania, charging said defendant with a violation of the provisions of Section 18, of the Act of Congress, approved March 3, 1899, (30 St. 1153). Rule granted as prayed for, returnable the 1st proximo, and directing that service of said rule be made upon said defendants, at least ten days prior to the return day. Feby. 16, 1906, Copy of said rule with marshal's return thereon showing personal service thereon of same on W. A. Edmiston, Secretary and treasurer of said defendants' company, filed. Feby. 27, 1906, Answer of said defendant to said rule filed. Apr. 3, 1906, on motion of John W. Dunkle, U. S. Attorney, order made making absolute said rule to show cause why information should not be filed and *and* directing that information be filed. Same day, information filed. Same day, on motion of John W. Dunkle, U. S. Atty., order made that a writ of *venire facias ad respondendum* issue returnable the first Monday of May, next. Same day, said writ issued. April 9, 1906, said writ with Marshal's return thereon, showing acceptance of service of Reed, Smith, Shaw and Beal, attorneys for defendant company, filed. Apr. 27, 1906, on precipe filed subpoena (1) issued. May 7, 1906, Stipulation *as* that defendants may take depositions of aged, infirm or going witnesses before any Notary Public, and that said depositions may be used upon the trial of this case, presented and stipulation ordered filed. June 21, 1906, Subpœnas (2) filed. Aug. 7, 1906, Depositions *Ex Parte* Defendant, filed. May 12, 1906, continued. Nov. 20, 1906, on precipes (2)

filed, subpoenas (4) issued. November 21, 1906, defendants plead *non cul et de hoc* &c. U. S. Attorney Similiter &c. Issue, and a Jury being called from the panel of Jurors of the United States Circuit Court came, viz: W. C. Knox, C. L. Blackmore, Thomas Cunningham, Edwin Hartley, Robert M. Bryan, Robert M. Ulp, C. C. Kuhn, Samuel Gilson, C. M. Bennett, G. W. Lewis, P. B. Carter and John Hamilton, Sr., twelve good and lawful men of the Western District of Pennsylvania, who being duly summoned, returned and empaneled, were sworn to try the issue herein joined. Same day, trial proceeds. Nov. 24, 1906, plaintiff's points filed. Same day defendants' points filed. Same day exhibits 1, 2 & 3 filed. Same day, order made directing marshal to furnish refreshments for Jurors. Same day Jurors on their oath aforesaid, respectively do say that they "Find a verdict of Guilty" and so they all say. Nov. 28, 1906, motion in arrest of judgment and by leave of Court filed. Same day subpoenas (5) filed. Nov. 30, 1906, motion for new trial filed. Nov., 1907, argument *per* said motion by John W. Dunkle, Esq., U. S. Attorney, for the United States and James H. Reed, Esq., attorney for defendant. C. A. V. Jan. 7, 1908, opinion of court handed down by Hon. R. W. Archbald, refusing motion for new trial. Same day, the sentence of the Court is, that the President, Managers and Company of the Monongahela Bridge Company, defendant, pay a fine of $1000 to the Government of the United States, and pay the costs of prosecution; and that execution issue against the property of the said defendant to collect such fine and costs unless the same be paid within ten days. Jan. 8, 1908, proof of notice of said sentence filed. Jany. 16, 1908, Order made extending time for obtaining writ of error to the Supreme Court for ten days from this date. Jan. 17, 1908, Order made staying execution for a period of ten days from this date. Jan. 24, 1908, Assignments of error filed. Jan. 25, 1908, Bond on appeal filed and approved. Same day, Citation issued. Jan. 27, 1908. On motion, order made that time for presenting and signing Bill of Exceptions be extended to the 24th prox. Jan. 24, 1908, Petition for writ of Error filed & Order made allowing same, bond to be given in $2500.00. Jan. 25, 1908, Writ of error issued. Feb. 20, 1908, Defendants' Bill of Exceptions filed. Feb. 19, 1908, Stipulation of parties interested; that in printing record in above case the clerk shall omit certain documents filed.

273 & 274

Appearances: John W. Dunkle for United States. Reed, Smith, Shaw & Beal, for defendants.

Witnesses, United States:
Maj. W. L. Seibert.
J. L. McFeeters.
Thomas P. Roberts.
Defendants:
George W. Leahart.
B. K. Morse.
Chas. L. Snowden.
H. B. Cock.
G. L. Moore.
W. A. Edmonson.

275 [Endorsed:] No. —. (— Docket.) United States District Court, Western District of Pennsylvania. —— —— *vs.* —— ——.

276 *Certificate of Exemplification.*

In the District Court of the United States for the Western District of Pennsylvania.

No. 1, May Term, 1906, Crim. Docket.

THE UNITED STATES
v.
THE PRESIDENT, MANAGERS AND COMPANY OF THE MONONGAHELA BRIDGE COMPANY.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, William T. Lindsey, Clerk of the District Court of the United States, for the Western District of Pennsylvania, do hereby certify that the annexed and foregoing pages are the original record and proceedings in the above entitled case stipulated by counsel to be printed so full and entire as the same were of record and on file in my office, in the City of Pittsburgh, in the said district, on the 24" day of February, 1908.

In Testimony Whereof, I have hereunto signed my name and affixed the seal of the said Court, at Pittsburgh, this 24" day of February A. D. 1908.

[Seal of U. S. District Court, W. D., Pennsylvania.]

WM. T. LINDSEY, *Clerk.*

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, James S. Young, District Judge of the United States, for said District, do hereby certify that William T. Lindsey, above named, was, at the time of making the above certificate and is now, Clerk of the said Court, and that the said certificate made by him is in due form of law.

JAMES S. YOUNG,
U. S. District Judge.

Pittsburgh, February 24, 1908.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, William T. Lindsey, Clerk of the District Court of the United States for the Western District of Pennsylvania, do certify that the Honorable James S. Young, by whom the foregoing attestation was made, and who has thereunto subscribed his name, was at the time of making thereof, and still is, Judge of the District Court of the

United States in and for said District, duly commissioned and qualified; to all whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere.

In Testimony Whereof, I have hereunto signed my name and affixed the seal of the said Court, at Pittsburgh, in said District, this 24" day of February A. D. 1908.

[Seal of U. S. District Court, W. D., Pennsylvania.]

WM. T. LINDSEY, *Clerk*.

277 [Endorsed:] No. 1, May Term, 1906, Crim. Docket. District Court of the United States, Western District of Pennsylvania. The United States *v.* The President, Managers and Company of The Monongahela Bridge Company. Exemplification of Record.

Endorsed on cover: File No. 21,053. W. Pennsylvania D. C. U. S. Term No. 650. The President, Managers and Company of The Monongahela Bridge Company, plaintiffs in error, *vs.* The United States. Filed March 3d, 1908. File No. 21,053.

Office Supreme Court, U. S.
FILED.
JAN 3 1910
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States

No. 91 OCTOBER TERM, 1909.

THE PRESIDENT, MANAGERS AND COMPANY OF THE MONONGAHELA BRIDGE COMPANY,
Plaintiff in Error,

vs.

THE UNITED STATES.

In Error to the District Court of the United States for the Western District of Pennsylvania.

BRIEF OF PLAINTIFF IN ERROR.

JAMES H. BEAL,
D. T. WATSON,
Attorneys for Plaintiff in Error.

Smith Bros. Co. Inc., Franklin Print, 412 Grant Street, Pittsburgh.

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PURPOSE OF THIS BRIEF.

To prove:

(1) That the Secretary of War did not afford the owners of the bridge the opportunity to be heard, nor the hearing which the act of Congress required, in that the only hearing granted was *after*, not before the officers who held it had passed upon and decided that the bridge was an unreasonable obstruction, and even such hearing was not conducted in a proper manner.

(2) That the officer who held the hearing created and *applied* the rule or test to determine whether the bridge was an unreasonable obstruction to navigation by looking *solely* at the traffic *on* the river *under* the bridge and seeing whether the bridge interfered with *that* traffic, and like traffic in the future, which rule is other and different from the rule declared by this court in the *Wheeling Bridge Case* and the *Escanaba Transportation Case* to be the proper one—*i. e.* to regard the traffic over and under the bridge and all the other circumstances surrounding the bridge. This ruling of the officer was approved by the Secretary of War.

If the Secretary had the power to adopt such a rule then the act is unconstitutional as a delegation of legislative power; if he had *not* such power and used a *wrong rule* or test then his order is void.

(3) That the order of the Secretary of War that he had good reason to believe the bridge was an unreasonable obstruction was not conclusive on the bridge owner and the court, and the bridge owner might in defence prove that the bridge was not an unreasonable obstruction to navigation and change in it was unnecessary.

If the ruling by the Court below that the order of the Secretary is conclusive is correct then the Act is unconstitutional *Because*:

(a) It vested in an executive officer of the Government, the power to finally adjudge against the bridge

owner the essential and indispensable fact upon which the validity of the subsequent criminal prosecution depended, and this deprived the bridge owner of his right of trial granted to him in all criminal trials by Article III and Amendement VI of the Constitution.

(b) As the Act of Congress required before conviction a trial in court, if it denied to the court the right to investigate and find the truth necessary to the proper administration of justice it was an unlawful limitation of judicial power.

If such ruling was *wrong* and the court should have received such evidence because it was a necessary inquiry for the administration of justice and a proper defense, then the conviction was erroneous.

(4) We respectfully ask this court to consider the objections to the construction it gave the act of congress of 1899 in the *Union Bridge Case*, and especially that portion of such construction which held that the act did not delegate to the Secretary either legislative or judicial power but merely selected him as an executive agent to pick out the criminal bridges, which the Act of Congress itself condemned.

The construction so adopted by this court was not discussed at bar nor in the brief of the Attorney General nor in that of the owner of the bridge.

(5) If the court will so reconsider, then to urge that the act does delegate legislative and judicial power; does take the property of the bridge owner for public use; does destroy such property without due process of law; does violate Article III and Amendment VI in that it denies to the bridge owner the trial by jury assured by such articles.

IN THE

Supreme Court of the United States

No. 91 OCTOBER TERM, 1909.

THE PRESIDENT, MANAGERS AND COMPANY OF THE MONONGAHELA BRIDGE COMPANY,
Plaintiff in Error,

vs.

THE UNITED STATES.

In Error to the District Court of the United States for the Western District of Pennsylvania.

Brief of Plaintiff in Error.

STATEMENT OF THE CASE.

(*References are to the printed Record.*)

The sole and only reason why the defendant was found guilty in the court below was that it had disobeyed the order of the Secretary of War, which order in effect required it to tear down its old bridge and build a new one.

The facts in the case are briefly as follows:

By an act of the General Assembly of the State of Pennsylvania entitled "An Act to authorize the Governor to incorporate a company to erect a bridge over the Monongahela River," approved March 16th, 1830, P. L. 102, certain commissioners were appointed

> "to examine and fix on the site for the erection of a bridge over the Monongahela River at or near where the *National* Road crosses said river."

Books were to be and were opened for subscriptions to stock and stock was subscribed, and the Governor issued letters patent, authorizing the construction of said bridge.

The Monongahela River rises in the mountains of West Virginia, flows northwardly through Pennsylvania to Pittsburgh, where it forms a junction with the Ohio and Allegheny Rivers.

In 1833 the Monongahela River was not navigable at the point where this bridge was erected. The navigation of the river stopped at Brownsville (proper), whereas the bridge was erected at a point farther up the Monongahela River to connect Bridgeport (now called South Brownsville) and West Brownsville. Dunlap's Creek ran between Brownsville (proper) and Bridgeport (68), and emptied into the river below the bridge. The river beginning at a point some distance below the present bridge, at the time of the bridge's erection, ceased to be navigable except by flat boats and during freshets. Brownsville (proper) was the head of navigation of the Monongahela River whereas this bridge was some distance above Brownsville (proper). Navigation from Brownsville up to the bridge was prevented by a natural bar or riffle. (84, 85, 88, 97, 99, 100, 112).

This highway bridge was erected by the defendant corporation and opened to traffic over the Monongahela River in the year 1833 (78).

The nearest highway bridge crossing the Monongahela River above Brownsville is at Morgantown, 50 miles distant, and below Brownsville at Belle Vernon, 12 miles distant (83).

The Government of the United States had prior to the erection of defendants bridge constructed what was known as the "National Pike," a road beginning at Cumberland in the State of Maryland, extending through Pennsylvania, crossing the Monongahela River by ford at or near Brownsville, and running to the River Ohio (69-74). The road through Brownsville anticipated the construction of a bridge across the Monongahela.

On August 15th, 1832, Lieutenant Mansfield addressed the Chief of Engineers of the United States Army (76) to the effect that as a company was constructing a substantial bridge over the Monongahela River across from Bridgeport, the United States Government found it unnecessary to build a bridge across the Monongahela River at that point; but the Government did build a bridge over Dunlap's Creek, which separated Brownsville from Bridgeport, to carry the road up to the new bridge of the Monongahela Bridge Company.

The National Pike, which had theretofore run down to the river at Brownsville, was thus changed so as to run up and connect with this new Monongahela Bridge built by the defendant in error; and after that the bridge was used as a link in the National Pike built by Congress. (59). (Court's Finding 11).

The bridge was 665 feet in length (p. 68), 38 feet 3 in. in width, with an elevation over pool water of 40 feet, and a channel span of 218 feet in width (54). This bridge was a connection between two flourishing towns in Pennsylvaia, West Brownsville and Bridgeport, located on either side of the Monongahela River. The road was really a street between the two towns and over it daily passed thousands of foot passengers, besides many coaches, wagons, teams, etc. (83). The traffic over the bridge very largely exceeded the traffic under it in amount and value. (83).

After the bridge was built and in 1836, the Monongahela Navigation Company was incorporated by Pennsylvania for slackwater navigation and it proceeded to build locks and dams on the River Monongahela at the following dates: Dams Nos. 1 and 2 in 1840 and in 1841; Nos. 3 and 4 in 1844; Nos. 5 and 6 in 1855. Dams Nos. 5 and 6 are above the Bridge, the others are below it. (84, 85, 98, 99).

In 1881 Congress made an appropriation for improvement, and since then has acquired the entire Monongahela Navigation system (See *Monongahela Navigation Co. vs. United States*, 148 U. S. 312).

Without notice to the bridge company, on April 29th, 1903 (28, 29) a petition was presented to the War Department alleging that the bridge was an unreasonable obstruction to navigation and asking for an investigation. The records show that after this petition was presented the following steps were taken:

It was referred by Colonel Mackenzie of the Corps of Engineers on May 5th, 1903, to Capt. W. L. Sibert (32),

"for investigation and report;"

September 8th, 1903, Capt. Sibert reports adversely to the bridge (32, 33), and in that report he said:

"In the opinion of this office this bridge is one that certainly requires action under section 18, River and Harbor Act of March 3, 1899."

In another place he says:

"* * * in the opinion of this office (this bridge is) an unreasonable obstruction to navigation."

He not only reports that the bridge is an unreasonable obstruction, but he proposes that the bridge be torn down (he calls it "altered"), and a new one be built that will give a clearance height of 52 feet and a channel span 400 feet wide (33). This at the expense of the Bridge Company.

No opportunity was given by the War Department or by Capt. Sibert to the Bridge Company to be heard prior to or at the time when Capt. Sibert presented to the War Department his first finding and report, and of this finding and report, no notice of any kind was given to the Bridge Company.

The investigation Capt. Sibert made was without inquiry by him of the Bridge Company, or knowledge of the Bridge Company, and without any opportunity given the Bridge Company to present its side.

When this report was filed in the War Department, Col. Gillespie of the Corps of Engineers recommended that (34)

"The papers be returned to Captain Sibert with instructions to hold a public hearing, after due notice to interested parties."

September 16th, 1903, the acting Secretary of War approved this (34) and on September 23rd Major Hodges of the Corps of Engineers returned the papers to Capt. Sibert,

calling his attention to the indorsements thereon. Captain Sibert after this gave a public hearing during which no witness was sworn, no opportunity for cross-examination was given, and at which extracts from newspapers and all kinds of unique items *called* evidence were heard.

May 23, 1904 Captain Sibert returned the report he had already made and accompanied it with a second report, which second report is given at length (pp. 57-63).

This report is based on and is in pursuance of the first report, and Captain Sibert reaffirms his previous report. The Captain's report (58) states the question for determination in this way:

> "Stripped of all unnecessary verbiage the question for determination is: Is there good reason to believe that a bridge that prevents the better class of towboats actually navigating the Monongahela River, the commerce of which stream is about 10,000,000 tons annually, from passing under it for 17.7 days per year and prevents the packets actually navigating said stream from passing under it for 52.1 days per year, all as determined by the official records kept by the United States, an unreasonable obstruction to navigation? * * * Would a railroad company consider that there was good reason to believe that its traffic was unreasonably obstructed by another highway, if its passenger and express business were absolutely stopped for 52.1 days per year and its freight business so stopped for 17.7 days per year, when the same could be overcome at a reasonable cost to the obstructing highway, which *latter* highway was the last built?"

The Captain treats the warning of the Bridge Company as to certain unsworn statements of manufacturing interests on the river in this way: (59)

> "This office is of the opinion that the statements of the above companies and representatives are as good *whether made under oath or not*, and knows of no reason why any greater caution should be exercised in accepting their *unsworn* statements as true than in accepting the *sworn* statements of the officers of the Monongahela Bridge Company as true."

He estimates the present income of the Bridge Company to be approximately $19,000 per annum on a capital stock of $200,000, and then he adds:

> "The ability of the owners to raise the necessary amount to construct the new bridge it is thought can be relied upon. It is not thought, however, that the company will rebuild this bridge at its *present site*, but will move it down stream where approaches will be inexpensive and where an overhead crossing of the railroad could be easily effected, all at a cost not to exceed $125,000."

He concludes that the bridge should be lowered or raised, in accordance with some rule that the railroads have for lowering and raising their tracks (59, 60); he answers a claim of the Bridge Company that a new low steamboat can be advantageously and safely navigated under the bridge as it is to-day, by copying into his report an item from the Pittsburgh Gazette, a daily newspaper of Pittsburgh, of Saturday, May 21st, 1904, which he holds *disposes* of the position of the Bridge Company as to these boats. On page 61 he again likens the building of a bridge across the river to the building of one railroad across the tracks of another, and seems to think that they are parallel cases. He says that

any bridge that will prevent the passage of any kind of river craft is wrong because in such case (61)—

> "the river highway is actually prevented from the crossing of the land highway, and is therefore deprived of a right which the latter highway enjoys to the exclusion of the former."

On page 62 he says:

> "This office is of the opinion that the following should constitute the grounds upon which a conclusion should be reached as to whether or not any particular bridge unreasonably obstructs navigation: First: Every bridge should be so constructed as to permit the passage under it or through it, with reasonable safety, of the average sized boat actually navigating the stream, at all practicable stages of water. Second: Any bridge that does not permit the passage of such boat at such stages of water *needlessly obstructs* the use of the river highway and exists under conditions that are not reasonable. * * * Third: Where the topographical conditions are such that bridges can be made of such heights, *without prohibitive cost*, as to permit at all navigable stages of water the passage of boats best suited to the river commerce, it is for the best interests of both the land traffic and the river traffic that bridges be so constructed."

He then gives extracts from the Acts of Congress in reference to bridging the Muskingum River. He files a blue-print showing pools Nos. 3 and 4 of the Monongahela River, and then he takes these pools at

"the highest navigable stage:"

puts upon the pool a boat with its chimneys and pilot house as high as the packets navigating the Monongahela River;

says they will require a clearance of 52 feet under the bridge, but he adds two feet more because it

"is almost a certainty," (62)

that one of the locks will be rebuilt, and its height increased which will raise the level of the pool.

He then says:

"Towboat navigation with the better class of boats actually in use is prevented for 17.7 days of the year from passing under this bridge; * * * and that the packets actually navigating this stream are prevented from passing under this bridge at such times for 52.1 days in the year," etc.

He neglected to state that one packet boat a day was all that went under the bridge (as he later admitted on the stand (50); that the average towboat went safely under the bridge; and that the traffic on and over the bridge exceeded that under it one hundred times.

He then concludes that this makes good reason to believe that the bridge is an unreasonable obstruction, and that it should be altered so as to give a channel span of not less than 390 feet, with a clearance height of 54 feet above the fourth pool of the Monongahela River. He calls this *altering* the bridge, and does not notice it will require the tearing down of the old bridge and building a new one.

This report was returned to the War Department and on the report so made we find the following indorsements by Chief of Engineers Mackenzie:

That there were twenty-four bridges across the Monongahela River below Morgantown, and that but three of these had a less clearance than 51 feet, and that Congress, by a

late Act, required bridges that crossed the fourth pool to have a clearance of 54 feet, the pool being one of a series of pools by which the Monongahela Navigation Company, a Corporation of the State of Pennsylvania, had theretofore, by means of dams and pools, created an artificial aid to the navigation of the Monongahela River. The indorsement goes on to say (57):

> "This is a case of obstruction and delay to existing navigation which even for brief periods may be a serious matter, meaning a *possible* delay in the supply of coal to the large manufacturing establishments, and affecting the prompt and systematic passage of craft through the locks of the Monongahela River improvement."

Without any hearing before the Secretary of War or Chief of Engineers Mackenzie, and without even exhibiting a copy of the Sibert Report to the Bridge Company, the War Department then had served on the Bridge Company on the 15th day of August, 1904, the following notice:

> "WAR DEPARTMENT,
>
> WASHINGTON CITY, August 10, 1904.
>
> *To the Monongahela Bridge Company, Brownsville, Pennsylvania*:
>
> TAKE NOTICE THAT
>
> WHEREAS, the Secretary of War has good reason to believe that the bridge of the Monongahela Bridge Company across the Monongahela River, at Bridge Street, in the Borough of Bridgeport, Pennsylvania, and commonly known as the Brownsville Bridge, is an unreasonable obstruction to the free navigation of the said Monongahela River (which is one of the navigable waterways of the United States) on account of insufficient height and length of span;

And Whereas, the following alterations, which have been recommended by the Chief of Engineers, are required to render navigation under it reasonably free, easy and unobstructed, to wit: So alter said bridge as to give a channel span of not less than 390 feet in length between the face of the right abutment as now located and the center of the pier; and that the said channel span shall give a clearance height of not less than 52 feet, above the Fourth Pool of the Monongahela River;

And Whereas, to August 1, 1905, is a reasonable time in which to alter the said bridge as described above:

Now, therefore, in obedience to, and by virtue of section eighteen of an Act of Congress of the United States entitled 'An Act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes,' approved March 3, 1899, I, William H. Taft, Secretary of War, do hereby notify the said Monongahela Bridge Company to alter the said bridge as described above, and prescribe that said alterations shall be made and completed on or before August 1, 1905.

Wm. H. Taft.
Secretary of War."

The Bridge Company, not having torn down its old bridge and built a new one, as recommended by Captain Sibert, the District Attorney of the United States for the Western District of Pennsylvania on April 3rd, 1906, filed an information against the Bridge Company, setting forth the order of the Secretary of War as to the alterations in the bridge, and that the Bridge Company had refused to obey such order, and alleging that the Bridge Company has wilfully failed, refused and neglected to comply with the said lawful order of the Secretary of War and had wilfully failed and refused to *remove* the said bridge over said Monongahela

River (6), and asking that sentence be pronounced for a violation of the Act of Congress.

The Bridge Company made an answer to this information objecting to the same and alleging it should not be allowed to be filed, and giving as reasons (1) that the Eighteenth Section of the Act of Congress approved March 3rd, 1899, under which the proceeding was taken was unconstitutional, and in addition as follows:

> "Second. That the said bridge is not an unreasonable obstruction to navigation of the Monongahela River, but navigation through or under it is reasonably free, easy and unobstructed.
>
> Third. The only offence under said Act is the failure by the Bridge Company to comply with the order of the Secretary of War requiring the reconstruction or alteration of its bridge."

And Fourth, that the Bridge was erected in the year 1833 at the cost of about $65,000, in accordance with an act of the General Assembly of Pennsylvania and before Congress assumed or exercised any jurisdiction over the Monongahela River, and when the river was navigable for a short time only during each year by push boats in time of freshet and high water; that the location and construction of the bridge was at the invitation of and with the assent and approval of the Government of the United States, as a part of the National Pike, and the bridge has been constantly so used and is being so used at the present day.

The answer was overruled; the information was filed; the case was called for trial in November, 1906, and the defendant pleaded not guilty.

The case is reported in 160 Fed. Rep. 712.

The following is a brief statement of the evidence:

GOVERNMENT'S EVIDENCE.

The Government offered a copy of the Act of the General Assembly in Virginia, passed Jan. 20, 1800, providing that the Monongahela River from the south boundary line of Pennsylvania up to the confluence of the rivers of Tyger Valley and West Branch, etc., (48)—

> "shall be forever considered and taken as a public highway, free for navigation;"

and providing for punishment for the obstruction of the navigation.

Captain Sibert was called as the first witness. He said his knowledge of the Monongahela River was limited to the five years last preceding, and that it was a navigable stream in the States of Pennsylvania and West Virginia: That the Government had, by its locks and dams, created a depth of 7 feet, and that any boat that draws more water could not navigate the stream. That all of the boats doing business in the Monongahela River can navigate it from Fairmount, West Virginia, to Pittsburgh, Pennsylvania; and that the principal commerce is coal. That the freight traffic at that time (1906) was between 10 and 12,000,000 tons annually. That there are two classes of boats navigating the Monongahela—*tow*boats and *packet* boats. That the height of the *tow*boats is from 24 to 32 feet, to the top of the pilothouse, and that the height of the *packet* boat is from 30 to 35 feet. (49).

That the river has sufficient water for the entire year, but on account of ice there are times during the winter when

it is not navigable. That Brownsville is 55 miles from Pittsburgh, and that there are four locks and dams between Pittsburgh and Brownsville. That the towboats are of the ordinary stern-wheel type, about 175 feet in length, and that the freight is loaded in barges which are about 8 or 9 feet in height, about 26 feet wide, and 180 feet long (50).

There is but one packet line between Pittsburgh and Morgantown and it runs *one boat a day*. That these packets draw about 5 feet. That the distance from Pittsburgh to Morgantown is 107 miles. That there are *railroads* on both sides of the Monongahela River, one on the left side from Pittsburgh to Morgantown, and the other on the right side from Pittsburgh to Brownsville (50). That the packet company has been sold at receiver's sale.

The Government next offered the Act of Pennsylvania approved March 16th, 1830, providing for the erection of the bridge (51).

It next offered in evidence the petition of April 29th, 1903, to the Secretary of War for an investigation in reference to the Bridge; and from pages 52 to 65 the indorsements of the War Department on that petition, including the two reports of Captain Sibert. It also offered the notice to alter the bridge was served on the Bridge Company August 15th, 1904 (67).

The Government then rested.

DEFENDANT'S EVIDENCE.

Evidence was introduced to prove the laying out by the United States Government in pursuance of an Act of January 31st, 1807, of a National highway from Cumberland, Md., running through Maryland, Virginia and into Pennsylvania, and to the Ohio River, and that this highway was built and connected with the Brownsville bridge (68, 78).

The defendant further proved that while the national highway originally crossed the Monongahela River by a ford at a point some distance below where the bridge was erected, after the bridge was erected the highway was changed and connected with the bridge (79).

Before slack water navigation was provided by building artificial dams, the river, except during a few months of the year, was not navigable; the boats used on the river when it was navigable were small flat boats, propelled by poles. The river was narrow and shallow (78). They ran small boats on the river before the lock was built, but only as far as Brownsville (87, 88). Regular navigation existed *only as far up as Brownsville;* the bridge of the defendant was located at Bridgeport some distance farther up, and navigation from Brownsville to the bridge was prevented by a riffle (84, 85, 88, 94, 97).

Before lock No. 4 was raised in 1856 the river was shallow. About that year the Navigation Company dug the channel out below the bridge and made it so that boats could get through. Commencing about a quarter of a mile above the bridge the Monongahela River was very shallow and the channel very crooked (84). At the bridge it was navigable only

by push boats in times of flood for three or four months in the year, and at the ordinary stage of water below the bridge it could be crossed on a log and was not more than 50 feet in width and 12 or 15 inches in depth (84, 85). The push boats used were 80 feet long by 12 feet wide. During the summer the river was very low (85), but in the fall and spring there were freshets.

The packet boats that passed under the bridge after Lock No. 4 was raised in 1856, were of the same size as those used to-day. From 1856 the packet trade from Pittsburgh to Brownsville increased until there were three or four boats running daily; but now it has very much decreased and the packet trade is hardly noticeable. It consists principally of excursions on the river in the summer (86); there is now only one line of packets running from Pittsburg and it makes only one trip a day (50).

The bridge has a continuous traffic of passengers and wagons and vehicles of all kinds. Originally over it passed the United States mails, conestoga wagons carrying freight, and the stage coaches, which ran from Baltimore and Cumberland to Wheeling and Pittsburgh. The traffic across the bridge was much greater and much more valuable than the traffic passing under it on the river, and nothing was brought down the river except sand, and sometimes gravel and flour on push boats. At the present time the nearest highway bridge above the bridge of the defendant Company is at Morgantown, some 50 miles distant, and the nearest bridge below Brownsville is 12 miles distant. (83).

> "Counsel for defendant then offered to prove by the witness on the stand, to be followed by other witnesses, that the bridge of the defendant, prior to and at the time of the making of the order of the Secretary of War, and at the present time, was not and is not an

unreasonable obstruction to the free navigation of the Monongahela River; and in this connection and for this purpose, also offered to show the kind and character of the traffic upon the river for the last thirty years and at the present time, and that all of this traffic has passed under the bridge without any accident at this bridge; that the presence of the bridge does not prevent the passage under the same of all of the traffic carried upon the river, and that for more than thirty years there has been no change in the kind or character of the traffic passing under the bridge, and the craft navigating the river, and that it is not necessary to make the proposed changes in the bridge for the purpose of making navigation reasonably free and unobstructed.

To this offer counsel for the United States objected as incompetent and irrelevant.

The objection was sustained for the reason that this question was CONCLUDED by the decision of the Secretary of War.

Exception was noted for the defendant." (86-87).

The receipts of the bridge for each of the years 1902 and 1903 were between $15,000 and $16,000; for 1904, between $11,000 and $12,000, and for 1905, $13,000. The net earnings were between $9,000 and $10,000; operating expenses were from $2,000 to $2,500 a year. (87).

Daily over the bridge pass from 2,500 to 4,000 or 5,000 foot passengers. The amount invested in the present bridge is from $65,000 to $75,000. To build a new bridge of the same structure to-day would cost from $130,000 to $140,000. (87). If a new structure was built, as required by the order of the Secretary of War, it would require the reconstruction of a public highway in Brownsville (90), and the property fronting on the public highway which would be seriously

injured includes a hotel that would sell for about $120,000, and a machine shop that would sell for about $80,000. The new construction would practically make the old highway useless, and damage these properties from one-third to one-half their present valuation (90).

The bridge is a solid, substantial structure (90); its length is 676.7 feet; the center width of the first span is 221 feet, and of the middle or channel span 227 feet, and of the other span 223 feet. At the center of the channel span the bridge is 40.6 feet above pool level (91). The engineer selected to examine the question reported that owing to the situation and cost of building a new bridge of the elevation required by the Secretary of War, that his idea would be to change the location; to buy a half square of property in Brownsville, and to run a new street or approach through that property to the bridge. That that would be exceedingly expensive. The new bridge alone, without damages for approach, would cost $112,859.00 (92).

GOVERNMENT'S REBUTTAL.

The Government's rebuttal bore upon the question as to when the artificial improvement of the navigation of the Monongahela River was begun, and by whom, and what it amounted to; and on this considerable evidence was given, beginning at page 101. But from the evidence given it is plain that nothing was directly done in the way of building locks and dams on the river until after the construction of the bridge (107).

POINTS OF DEFENDANT.

The testimony being closed, Counsel on each side requested the Court to charge the jury as follows:

"Thereupon counsel for the defendant requested the court to rule and instruct the jury in accordance with the following points of law:

1st. The authority conferred upon the Secretary of War by Section 18 of the Act of March 3, 1899, to require any bridge constructed across any navigable water of the United States, which is an unreasonable obstruction to navigation to be so altered as to render navigation reasonably free, easy and unobstructed, applies only to bridges constructed under the authority of Acts of Congress which reserved such power to Congress.

Answer. Refused.

To which answer the defendant excepted, and exception was noted.

2nd. The question whether the bridge was so constructed as unreasonably to interfere with the navigation of the river was to be determined by the requirements of navigation at the time when the bridge was erected, and was not made dependent upon the interest of future navigation, and Congress could not compel the alteration of such bridge then properly constructed, at the expense of the bridge owner, and without compensation, merely because it might under the views of the Secretary of War, in the future be an unreasonable obstruction to some new and improved method of navigation.

Answer. Refused.

To which answer the defendant excepted, and exception was noted.

3rd. The Monongahela Bridge having been erected under a statute of the State of Pennsylvania, granting the Bridge Company such power, and with the acquiescence and assent of the United States Government, and prior to the Congress of the United States having assumed jurisdiction over said river, it became a lawful structure and the lawful property of the Monongahela Bridge Company, and the United States cannot deprive the Bridge Company of that property without due process of law, including compensation for the loss of the Bridge Company.

Answer. Refused.

To which answer defendant excepted and exception was noted.

4th. The requirement by the Secretary of War in his order for the reconstruction of the Monongahela Bridge which compels the removal by the Monongahela Bridge Company of the present structure and the erection of a new one, is a virtual taking of the property of the Bridge—by the United States without due process of law, and therefore in violation of the Federal Constitution.

Answer. Refused.

To which answer defendant excepted and exception was noted.

5th. The requirement of the Secretary of War in his order compelling the reconstruction of the Bridge at the expense of the Bridge Company, and without compensation to the Bridge Company, is a virtual taking of the property for public use without just compensation, and is therefore in violation of the Federation Constitution.

Answer. Refused.

To which answer defendant excepted and exception was noted.

6th. From the evidence in the case the jury may find that the United States both by its Executive and Legislative Departments, invited, acquiesced in and approved of the erection of the Monongahela Bridge as it now stands, and if they so find and also find that the Government made it a part of the National highway, and it was used as such, the defendant cannot be compelled by the order of the Secretary of War, to change the said bridge and alter the same at its own expense as is provided in said order, because that would be the taking of the private property of the defendant without due process of law, and without compensation.

Answer. Refused.

To which answer defendant excepted and exception was noted.

7th. This information being based upon a non-compliance by the Monongahela Bridge Company with the order of the Secretary of War, which order it is alleged was made under the provisions of the Act of Congress approved March 3rd, 1899, cannot be maintained, because in respect to these proceedings the provisions of said Act are null and void, for the following reasons:

(a) It attempts to take and destroy the private property of the Monongahela Bridge Company without due process of law; contrary to the provisions of the Constitution:

(b) It undertakes to authorize the taking and the destruction of private property for public use without just compensation, contrary to the provisions of the Constitution:

(c) It undertakes to unlawfully delegate to the Secretary of War of the United States and to the Chief

of the Engineer Corps of the United States Army, both legislative and judicial powers, and this in contravention of the Constitution of the United States.

Answer. Refused.

To which answer defendant excepted and exception was noted.

8th. The said Act of Congress makes it the duty of the Secretary of War to first give the party reasonable opportunity to be heard, and to give notice to the persons or corporation owning or controlling such bridge (in this case the Monongahela Bridge Company) so to alter the same as to render navigation through or under it reasonably free and unobstructed, and in giving such notice the Act requires him to specify the changes recommended by the Chief of Engineers that are required to be made, and the Secretary of War shall prescribe in each case a reasonable time in which to make such changes. Under this Act the Secretary of War was required affirmatively to give to the Monongahela Bridge Company, the owner of the bridge in controversy, an opportunity to be heard by him, the Secretary of War, on the questions whether the bridge was an unreasonable obstruction to navigation and what alterations shall be made, before he was authorized or lawfully empowered to give the notice and make the order he did to the Monongahela Bridge Company, requiring the alteration of said bridge, and it appearing affirmatively that the Secretary of War, in making the order, set forth in the information, never at any time gave the Monongahela Bridge Company reasonable opportunity to be heard before him, or any hearing whatsoever, therefore, the said order is not a lawful one, and this prosecution must fail.

Answer. Refused.

To which answer defendant excepted and exception was noted.

9th. That under the evidence in the case it is for the jury to determine whether the Monongahela Bridge is an unreasonable obstruction to navigation of the Monongahela River.

Answer. Refused.

To which answer defendant excepted and exception was noted.

10th. Conceding that Congress might by direct Act declare the Monongahela Bridge an unreasonable obstruction to navigation, the United States has failed to show that Congress ever has taken any such action, or has ever disapproved of the bridge as constructed.

Answer. Refused.

To which answer defendant excepted and exception was noted.

11th. The evidence showing that Captain Sibert, without affording the Monongahela Bridge Company an opportunity to be heard, first examined and then reported that the bridge was an unreasonable obstruction to navigation and the matter was then referred back to Captain Sibert to grant the Monongahela Bridge Company a hearing—does not show such a hearing as the Act of Congress provides for, and the fact that the Bridge Company appeared before him will not alter the case, as it is not shown that the Bridge Company knew the fact of his previous examination and report.

Answer. Refused.

To which answer defendant excepted and exception was noted.

12th. Under all the evidence in the case their verdict must be for the defendant.

Answer. Refused.

To which answer defendant excepted and exception was noted.

13th. The Government cannot as in this case destroy the property of the Monongahela Bridge Co. by delegating to the Secretary of War or the Chief of Engineers power to make the order which was done in this case, nor enforce the same through the Federal Courts, without giving the Bridge Company an opportunity to defend on the ground that the bridge is not an unreasonable obstruction to navigation.

Answer. Refused.

To which answer defendant excepted and exception was noted."

GOVERNMENT'S POINTS.

"Thereupon counsel for the United States requested the court to rule and instruct the jury in accordance with the following points of law:

1st. By Section 18 of the Act of March 3rd, 1899, (30 St. 1153) Congress placed on the Secretary of War the duty of determining whether or not bridges over natural waterways of the United States were obstructions to the navigation of such waterways. In case he complied with the requirements of the law in regard to a hearing, and fixed a reasonable time for the completion of the prescribed alterations, his notice to alter the Monongahela Bridge, set forth in the information filed at above number and term, was a lawful notice, and the failure to alter said bridge in accordance with said order,

or to move the said structure, if continued during the month of September, 1905, constituted the misdemeanor charged in the Information; and though the defendant originally built said Monongahela Bridge under color of authority of an Act of Assembly of the State of Pennsylvania, and even though the requirements of that Act of Assembly were strictly observed by said Bridge Company in constructing said bridge, such Act of Assembly would not constitute a valid defense to the information.

Answer. That is a correct statement of the law.

To which answer defendant excepted and exception was noted.

3rd. Section 18 of the Act of March 3rd, 1889, directs the Secretary of War to give parties interested, to-wit, the bridge owners, a reasonable opportunity to be heard, prior to issuing final notice to said bridge owners, to make the alterations deemed necessary by him in order to render the bridge under consideration not an obstruction to the free navigation of the river spanned by it. Such hearing need not be held by the Secretary of War in person; and it is sufficient under the provisions of the Act if the Secretary of War had given said owners an opportunity to be heard relative to the proposed alterations before one or more of his agents or subordinates, and the testimony or statements made at said hearing have been submitted to and considered by the Secretary of War.

Answer. That is a correct statement of the law.

To which answer defendant excepted and exception noted."

In addition to the answers to these points, the court charged the jury at considerable length and that charge will be found on pages 116 to 124, both inclusive. Among other things, the court charged as follows (117):

CHARGE OF THE COURT.

"The authority of the Secretary of War to act as he has done in the premises cannot be questioned. * * * Provision, therefore, has been made, that when, in the judgment of the Secretary of War, there is an obstruction to such navigable waters, he, after giving notice to the parties and affording them an opportunity to be heard, may make an order requiring the removal or change of such obstruction, specifying what changes shall be made and within what time it shall be done.

"All that has been pursued in this case, and the regularity of what has been done by the Secretary of War is not now open to question. It must be accepted and complied with, unless a sufficient reason has been given in the position taken by the defendants for not complying with it.

"By the slack water improvement of the Monongahela River extending above and below this bridge, it is now located on what has been adopted as a part of the navigable waters of the nation devoted to interstate commerce, and the bridge having been pronounced in this way, by due authority, to be an obstruction, that is the end of that matter."

The court calls attention to the severity of the penalty, $5,000, and that unless the changes are made at once, a new offense is created, and said to the Jury:

"So that you would have offense upon offense and fine upon fine to such an extent that parties would hardly be able to hold out against it.

"So there is no question in this case for you to decide as to *whether or not this bridge is an obstruction,* or whether or not the changes shall be made by which the obstruction that it now presents shall be removed.

"The only question which is before you is whether or not the defendants are entitled to ask that the expense of this, instead of falling upon themselves, shall be borne by the General Government. And upon that, upon their right to make that demand, depends the question whether or not they are to be pronounced guilty or not guilty of this charge."

The court said that the compliance with the order of the Secretary of War required that

"* * * this bridge must practically be torn down, according to the evidence of Mr. Morse, whose testimony does not seem to be controverted."

The new bridge would cost, exclusive of right of way in damages, $112,000.00 (118).

"Now does that amount to a taking, within the provision of the Constitution? It seems to me that if it causes a substantial or serious destruction of the property which the defendants now hold and enjoy, it does come within this provision of the Constitution. * * * It amounts, in my judgment, to a taking within the provisions of the Constitution for which under ordinary circumstances, compensation must be made."

The court then explained to the Jury that if a person undertook to locate a bridge over interstate navigable waters without the consent of Congress, Congress could remove it, but if the party located a bridge upon a stream away in the interior, which it was not probable would ever be connected with interstate commerce, and Congress did subsequently,

by artificial means, so connect, then the owner of the bridge could demand compensation before he was required to remove it. He then said, directing the Jury's attention to the specific case before them, that the question for them to determine was whether the owners of that bridge when they erected it foresaw or should have foreseen the future artificial improvements of the river to make it navigable (120, 121).

On page 122, he summed up as follows:

> "This cause, then, really, practically comes down to that—to the disposition of those two questions. The first, of course, being the question whether the changes that are required upon this bridge would amount to a taking. But, if you dispose of that question in favor of the defendants, then the case depends really upon this other question—whether this was a navigable stream or water-way or whether these parties had reason, from the conditions existing there at the time or that of which they were bound to take notice, to believe that it might be devoted to such a purpose as it now has been."

After the verdict of guilty was rendered, the defendants made a motion in arrest of judgment for a new trial, both of which were overruled. Sentence was imposed that the Bridge Company pay a fine of $1,000, and thereupon this writ of error was allowed and taken to this court.

ASSIGNMENTS OF ERROR.

First. The Court erred in sustaining the objections to and in overruling the following offer of evidence made by the defendant on the trial:

OFFER.

"Counsel for defendant then offered to prove by the witness on the stand, to be followed by other witnesses, that the bridge of the defendant, prior to and at the time of the making of the order of the Secretary of War, and at the present time, was not and is not an unreasonable obstruction to the free navigation of the Monongahela River; and, in this connection and for this purpose, also offered to show the kind and character of the traffic upon the river for the last thirty years and at the present time, and that all of this traffic has passed under the bridge without any accident at this bridge; that the presence of the bridge does not prevent the passage under the same of all of the traffic carried upon the river, and that for more than thirty years there has been no change in the kind or character of the traffic passing under the bridge, and the craft navigating the river, and that it is not necessary to make the proposed changes in the bridge for the purpose of making navigation reasonably free and unobstructed.

To this offer counsel for the United States objected as incompetent and irrelevant.

The objection was sustained for the reason that this question was concluded by the decision of the Secretay of War.

Exception was noted for the defendant."

SECOND. The court erred in charging the Jury as follows:

> "All that has been pursued in this case, and the regularity of what has been done by the Secretary of War is not now open to question. It must be accepted and complied with, unless a sufficient reason has been given in the position taken by the defendants for not complying with it. * * *
>
> So there is no question in this case for you to decide as to whether or not this bridge is an obstruction, or whether or not the changes shall be made by which the obstruction that it now presents shall be removed. (117).

To which portions of the charge the defendants duly excepted and the bill of exceptions was sealed by the Court.

THIRD. The court erred in its answer and its refusal to affirm the Ninth point of the defendant, which point and answer are as follows:

> "That under the evidence in the case it is for the Jury to determine whether the Monongahela Bridge is an unreasonable obstruction to navigation of the Monongahela River.
>
> Answer. Refused.
>
> To which answer defendant excepted and exception was noted."

FOURTH. The court erred in its refusal to affirm and its answer to the Thirteenth point of the defendant, which point and answer thereto are as follows:

> "The Government cannot as in this case destroy the property of the Monongahela Bridge Company by delegating to the Secretary of War or the Chief of En-

gineers power to make the order which was done in this case, nor enforce the same through the Federal Courts, without giving the Bridge Company an opportunity to defend on the ground that the bridge is not an unreasonable obstruction to navigation.

Answer. Refused.

To which answer defendant excepted and exception was noted."

FIFTH. The court erred in its answer to and refusal of the Eleventh point of the defendant which point and the answer thereto are as follows:

"The evidence showing that Captain Sibert, without affording the Monongahela Bridge Company an opportunity to be heard, first examined and then reported that the bridge was an unreasonable obstruction to navigation and the matter was then referred back to Captain Sibert to grant the Monongahela Bridge Company a hearing—does not show such a hearing as the Act of Congress provides for, and the fact that the Bridge Company appeared before him will not alter the case, as it is not shown that the Bridge Company knew the fact of his previous examination and report.

Answer. Refused.

To which answer defendant excepted and exception was noted."

SIXTH. The court erred in its answer to the third point submitted on behalf of the United States, which point and answer are as follows:

"Third. Section 18 of the Act of March 3rd, 1889, directs the Secretary of War to give the parties interest, to-wit, the bridge owners, a reasonable opportunity to be heard prior to issuing final notice to said

bridge owners, to make the alterations deemed necessary by him in order to render the bridge under consideration not an obstruction to the free navigation of the river spanned by it. Such hearing need not be held by the Secretary of War in person; and it is sufficient under the provisions of the act if the Secretary of War had given said owners an opportunity to be heard relative to the proposed alterations before one or more of his agents or subordinates, and the testimony or statements made at said hearing have been submitted to and considered by said Secretary of War.

Answer. That is a correct statement of the law."

SEVENTH. The court errred in its refusal of and its answer to the Third point of the defendants, which point and answer thereto are as follows:

"The Monongahela Bridge having been erected under a statute of the State of Pennsylvania, granting the Bridge Company such power, and with the acquiesence and assent of the United States Government, and prior to the Congress of the United States having assumed jurisdiction over said river, it became a lawful structure and the lawful property of the Monongahela Bridge Company, and the United States cannot deprive the Bridge Company of that property without due process of law, including compensation for the loss of the Bridge Company.

Answer. Refused.

To which answer defendant excepted and exception was noted."

EIGHTH. The court erred in its answer to the Fifth point of the defendant and its refusal to affirm the same, which point and the answer thereto are as follows:

"The requirement of the Secretary of War in his order compelling the reconstruction of the bridge at the expense of the Bridge Company, and without compensation to the Bridge Company, is a virtual taking of the property for public use without just compensation, and is therefore in violation of the Federal Constitution.

Answer. Refused.

To which answer defendant excepted and exception was noted."

NINTH. The court erred in its refusal to affirm the Seventh point of the defendant, which point and the answer thereto are as follows:

"This information being based upon a noncompliance by the Monongahela Bridge Company with the order of the Secretary of War, which order it is alleged was made under the provisions of the Act of Congress approved March 3rd, 1899, cannot be maintained, because in respect to these proceedings the provisions of said Act are null and void, for the following reasons:

(a) It attempts to take and destroy the private property of the Monongahela Bridge Company without due process of law, contrary to the provisions of the Constitution:

(b) It undertakes to authorize the taking and the destruction of private property for public use without just compensation, contrary to the provisions of the Constitution:

(c) It undertakes to unlawfully delegate to the Secretary of War of the United States and to the Chief

of the Engineer Corps of the United States Army, both legislative and judicial powers, and this in contravention of the Constitution of the United States.

Answer. Refused.

To which answer defendant excepted and exception was noted."

TENTH. The court erred in submitting the case to the jury in the following manner:

"This cause then, really, practically comes down to that—to the disposition of those two questions. The first, of course, being the question whether the changes that are required upon this bridge would amount to a taking. But, if you dispose of that question in favor of the defendants, then the case depends really upon this other question—whether this was a navigable stream or water-way, or whether these parties had reason, from the conditions existing there at the time or that of which they were bound to take notice, to believe that it might be devoted to such a purpose as it now has been."

ELEVENTH. The court erred in refusing to rule and instruct the jury in accordance with the request contained in defendant's Sixth Point, which point was as follows:

"Sixth. From the evidence in the case the jury may find that the United States, both by its executive and legislative departments, invited, acquiesced in and approved of the erection of the Monongahela Bridge as it now stands, and if they so find, and also find that the Government made it a part of the National Highway, and it was used as such, the defendant cannot be compelled by the order of the Secretary of War to change

the bridge and alter the same at its own expense, as provided in said order, because that would be taking the private property of defendant without due process of law and without compensation."

TWELFTH. The court erred in its answer to and its refusal to affirm the Twelfth point of the defendant, which point and the answer thereto are as follows:

"Under all the evidence in the case, their verdict must be for the defendant.

Answer. Refused.

To which answer defendant excepted and exception was noted."

THIRTEENTH. The court erred in entering judgment on the verdict and in pronouncing sentence upon the defendant as follows:

"The sentence of the court is that the Monongahela Bridge Company, defendant, pay a fine of $1,000.00 to the Government of the United States, and pay the costs of prosecution, and that execution issue against the property of said Company to collect such fine and costs unless the same be paid within ten days."

QUESTIONS.

The present case raises questions *neither raised* nor *discussed* in the *Union Bridge Case*, 204 U. S., 364, which questions are as follows:

(1) Is it true that the decision of the Secretary of War that he had good reason to believe that a particular bridge is an unreasonable obstruction to navigation, is conclusive on the owner of the bridge and the United States Courts so that when the question is raised in a prosecution under the Act of 1899 in those courts, they are bound by that opinion of the Secretary, and the Court cannot itself consider and decide whether the bridge is such an unreasonable obstruction, even though the owner of the bridge then offers, as in this case, to prove that it is not.

(2) When the record of the proceedings before the Secretary of War shows that the Secretary of War arrived at his conclusion, that he had good reason to believe that the bridge was an unreasonable obstruction, by considering *solely* and *only* the traffic on the river passing under the bridge, and not by considering both the traffic over and that under the bridge, and all the other circumstances in the case, as this court ruled should be done in the *Escanaba Transportation Co. vs. Chicago*, 107 U. S. 688: can the ruling of the court below that such proceedings before and action of the Secretary conclusively prove that the bridge is an unreasonable obstruction to the river—be sustained, and should not the court have held:

(a) That as the Secretary himself established the rule this constituted legislation, and even if the rule

was within his power to make, it was an unlawful delegation of power, because it vested in the Secretary legislative power and also the power to decide the law and the facts, and then, through a mere formal proceeding in Court, destroy the bridge; or,

(b) That the Secretary should have followed the *Escanaba Case*, and not having done so, his order is void.

(3) When the record in the case shows that a hearing was *not* granted to the bridge owners except before Captain Sibert, and that such hearing was *after* (not *before*) Captain Sibert had investigated and arrived at and reported to the Secretary of War that in his (Sibert's) opinion, the bridge was an unreasonable obstruction to navigation—is this such a hearing as the Act of Congress contemplates, and is it due process of law,—especially when Sibert's first investigation, conclusion and report were without the knowledge of the owners of the bridge and the subsequent approvals of Sibert's second report by different officers of the War Department and the Assistant Secretary of War were also without the knowledge of the owners of the bridge and also without a hearing given the owners before any one of such officers.

(4) If the court below was correct in holding that the decision of the Secretary of War that he had reason to believe that the bridge was an unreasonable obstruction to navigation, was conclusive on the bridge owners and on the court, and that neither the court nor the

bridge owners could in such proceedings as these investigate and determine the question whether the bridge was an unreasonable obstruction to navigation, then a new question arises, to wit: Is not this denying to the owners of the bridge, now accused of a crime, a trial by jury secured to them by Section 2, Article III and Amendment VI of the Federal Constitution? Is it not a delegation to the Secretary of War of judicial power wherein he is made the court of last resort, and his conclusions are without exception or appeal? Is it not a delegation also of legislative power, as the record shows, that the Secretary of War adopted for himself and contrary to the rule laid down by this Court in the *Escanaba Case,* a rule of law to test the question whether the bridge was or was not an unreasonable obstruction to navigation:—is not this the making of law? Is it consistent with our theory of government, wherein the legislative and the judicial powers are carefully vested in different independent bodies, that the liberty and property of citizens should be subjected to the arbitrary power of the Secretary of War in thus making the law, and then himself deciding the facts in the case as to whether the bridge owner had or had not violated such law, and then using the courts to enforce his order?

(5) Under the legislation of Congress the Brownsville bridge was made one of the links in the National Pike which the U. S. Government constructed and the bridge stands there with the sanction of the U. S. Government and therefore *also* this case differs from that of the Union Bridge.

We also most respectfully ask the court to consider the objections to the construction of the Act of 1899, given by

this court in the Union Bridge case, and for the following reasons:

(a) That construction which the court arrived at in the *Union Bridge case*, that this act was a declaration by Congress that all bridges which unreasonably obstructed the navigation of the river should be changed or altered so as to prevent such obstructions, and that the power given to the Secretary of War was neither judicial nor legislative, but merely executive, and all that the Secretary of War had power to do was to *pick out* the unreasonable bridges was not argued at the bar—was not argued in the brief of the Attorney General—and was a question on which the counsel representing the Bridge Company had not opportunity of being heard.

(b) With the greatest respect, and in performance of the duty we owe the Court to speak frankly what we believe to be the truth, we do submit that such a construction is not justified by the words of the Act, and cannot be sustained on its merits, and this for various reasons.

(c) That construction does not recognize the fact that, as the court below held, to the Secretary of War is delegated the power to create the test to which all bridges are to be subjected to find out whether they are unreasonable obstructions, and then the Secretary of War himself applies the test and finds the facts, and his conclusions, as the Court below held, are without exception or appeal. Thus the Act vests in the Secretary of War both legislative and judicial powers and combines them in one person, and the Secretary, not Congress, makes the law as to what shall be an unreasonable bridge; and himself, and no one else, decides what bridges are condemned by his own rule.

(d) The act itself does not give any rule by which to determine whether any given bridge is unreasonable, and the question as to whether it is unreasonable can only be determined *after* the examination by the Secretary of War, and by him alone. How then is it possible to say that the Act of Congress can apply to any given bridge until *after* the Secretary of War has passed upon the facts? Congress has not put a mark on the unreasonable bridge so that it can be picked out. It has not by rule or measurement or in any way pointed out those bridges.

(e) If it be true that such legislation is valid, that all nuisances can be denounced and an agent whose work is infallible picks them out, then it is most respectfully submitted that Congress might pass an act denouncing all persons who were guilty of forgery or of any other crime, and then appoint the Chief of the Detective Service to pick out the individual who had committed any one crime, and have the determination of the Chief of Detectives conclusive as to the guilt.

It is most respectfully suggested that this is a logical deduction from the doctrine announced in the Union Bridge Case.

(f) In picking out the bridge that is an unreasonable obstruction the Secretary of War must consider the facts, and come to a conclusion, and to hold that that conclusion is final, as the Court below ruled, is to convict the owners of the bridge of the maintenance of a nuisance by an executive order and without a real trial by jury in contravention of Section 2 of Article III and Article VI of the Federal Constitution.

(g) Because it enables the Secretary of War, acting as the opinion of this court says in the Union Bridge

case, as a mere executive officer, to compel the bridge company to spend a large amount of money, and to do so without any hearing before anybody in reference to the power of the Secretary of War or the correctness of his conclusions in a given case, or the necessity of the changes to be made, it deprives the bridge owner of all resort to the courts, for so the Court below ruled, and thus in effect deprives him of his property without due process of law, and takes from him for public use his property without just compensation.

(h) It is respectfully submitted that no one of the cases heretofore decided by the Supreme Court of the United States involved the right of the owner of private property, such as the one at bar, and that all the decisons in reference to the power delegated to the President and other different officers of the Government of the determination of questions of fact, related to the political and governmental powers of the government, and not to cases directly relating to the ownership of private property, by a citizen of the United States, and especially not relating to the question of the guilt or innocence of a person in maintaining a nuisance.

(i) If we can satisfy the Court that the construction of the act in the Union Bridge Case should be modified, then to insist that the act is invalid:

Because:

(a) It delegates both legislative and judicial power and to the same person.

(b) It destroys property without due process of law and takes property for private use without compensation.

(c) It denies to the bridge owners such a trial by jury as Article III, Section II, and amendment VI guarantee to the citizens of the United States.

Argument.

I.

THE COURT BELOW ERRED IN REFUSING THE OFFER OF THE BRIDGE COMPANY TO PROVE THAT THE BRIDGE WAS NOT AN UNREASONABLE OBSTRUCTION TO THE NAVIGATION OF THE RIVER, AND THAT THE CHANGES IN THE BRIDGE ORDERED BY THE SECRETARY OF WAR WERE NOT NECESSARY; AND IN ALSO RULING THAT THE PROCEEDINGS BEFORE THE SECRETARY OF WAR WERE CONCLUSIVE, AND NOT SUBJECT TO THE EXAMINATION OF THE COURTS.

Under this point may appropriately be argued the First, Second, Third and Fourth Assignments of Error, as they all raise substantially the same questions, which in brief are as follows:

(a) Was the order of the Secretary of War in which he stated that he had good reason to believe the bridge was an unreasonable obstruction to navigation, and therefore certain changes should be made, final and conclusive, not only on the owners of the bridge, but on the courts?

Was not the court below authorized to investigate and determine the question of fact as to whether the bridge was an unreasonable obstruction to navigation, and whether the changes represented were necessary?

(b) Was it not the right of the defendant on the trial below to challenge the jurisdiction and validity of the order of the Secretary of War, and was it not also the duty of the court to accept evidence to show that the bridge was not an unreasonable obstruction to the navigation, and itself decide whether or not the Secretary of War had jurisdiction to make the order in question, and whether the said order was valid, and to hold that if he had not the jurisdiction to so order, under the facts and the order was not a lawful order, that the Government's case failed?

(c) The court below held that the order of the Secretary conclusively established that the bridge was an unreasonable obstruction, and that changes were necessary, and as this fact of the bridge being an unreasonable obstruction was the very foundation of the jurisdiction of the Secretary of War, and without which his order was not legal or valid, should not the court have received evidence to show that the bridge was *not* an unreasonable obstruction, because, in addition to the reasons above given, this making the order of the Secretary of War final on the question of obstruction necessarily disposed of the defense of the owners of the bridge to the charges made against them in the indictment; which charges really and substantially were that the bridge was an unreasonable obstruction and the owners were guilty of the maintenance of a nuisance?

(d) Was it due process of law for the court below to deny to the owners of the bridge an opportunity of

demonstrating that the bridge was not an obstruction, and will a court before whom one is indicted, allow the guilt of the defendant to be conclusively established by an order of the Secretary of War, who is part of the Executive Department of the Government? Are not all the facts in the case for the investigation and determination of the court?

The views of his Honor in the court below on these questions were definite and were stated and re-stated.

In answer to the offer to prove that the bridge of the defendant was not and is not an unreasonable obstruction to the free navigation of the Monongahela River, and that the changes ordered to be made in the bridge were unnecessary, and that the traffic under the bridge could be safely carried on without inconvenience, the court said that the objection of the Government was sustained

> "for the reason that this question was *concluded* by the decision of the Secretary of war."

The court also charged the jury as follows:

> "All that has been pursued in this case, and the *regularity* of what has been done by the Secretary of War, *is not now open to question.* * * * So there is no question in this case for you to decide as *to whether or not this bridge is an obstruction* or whether or not the changes shall be made by which the obstruction that it now presents shall be removed."

The court also ruled in answer to the ninth point of the defendant that the jury did not have to and could not in this case determine whether the Monongahela Bridge was an unreasonable obstruction to the navigation of the river.

The court in its answer to the Thirteenth point of the defendant below ruled that the Bridge Company could be convicted without giving it an opportunity to defend in the courts on the ground that the bridge was not an unreasonable obstruction to navigation.

The court finally charged the jury and left the case with them in this way (122):

> "This cause, then, really practically comes down to that, to the disposition of those two questions: the first, of course, being the question whether the changes that are required upon this bridge would amount to a taking. But if you dispose of that question in favor of the defendants, then the case depends really upon this other question, whether this was a navigable stream or waterway, or whether these parties had reason from the conditions existing there at the time, or that of which they were bound to take notice, to believe that it might be devoted to such a purpose as it now has been. * * * Whatever the loss to themselves, they must comply with this order, if this condition be true, and you must pronounce them guilty on this charge."

The purpose of the Act of 1899 was to relieve navigation of unreasonable obstructions by compelling changes to be made in unreasonable bridges. Such changes as in this case required the destruction of the bridge and the building of a new one. This prosecution is to compel the bridge owners to tear down their present bridge and erect a new one—and because they have *refused* to do so, saying their bridge is not an unreasonable obstruction to navigation and the changes ordered are not necessary, the Court below convicted them of a crime, i. e., said they were guilty of a misdemeanor even if as a fact their bridge was not an unreasonable obstruction to navigation and no changes were necessary.

Thus the property of the citizen is involved. The proceedings in court are formally to compel an obedience to the Secretary's orders and to fine the bridge owner until he does so obey, and obedience compels the bridge owner to destroy the property he now has and to spend his money to erect a new bridge. But of this property the bridge owner may not be deprived except by due process of law. Even if the proceedings do not amount to a *taking* of private property for public use, yet the proceedings do *deprive* the owner of his property, and this deprivation cannot be without due process of law.

Congress did not give to the War Department the power to enforce its own orders and compel the bridge to be torn down and rebuilt, but compelled the War Department, for the enforcement of its orders, to go into court and enforce its orders by judicial proceedings. These judicial proceedings necessarily required the due process of law which, under the established decisions of this court, is necessary for a trial where the property or liberty of the citizen is involved.

Congress did not in the Act of 1899 make the finding of the Secretary of War conclusive on the court. It did not limit the jurisdiction of the court, and it did not attempt to define the method in which the court would proceed on the trial.

The proposition of the government that the order of the Secretary of War finally and decisively concludes the question that the bridge is an unreasonable obstruction and that the courts were not at liberty to investigate that fact but must take it as a fact by reason of the order of the Secretary of War, was sustained in the court below. But this decision, we submit, overlooks the material fact that the court of necessity must inquire as to *how* the Secretary of

War got his power and jurisdiction to so definitely decide that question. As we have said, the Act of Congress does not in itself expressly and formally give that effect to the decision of the Secretary. The Government, then, must prove *how* and by adequate authority the power was conferred upon the Secretary. A close study of the Act of Congress, however, seems to demonstrate that the Secretary of War had no power over any bridge to change it and to destroy it, *unless* it was an unreasonable obstruction. If it be said that the wording of the Act that the Secretary "has good reason to believe," merely means the exact definition of those words, then the reply is that the mental impression of the Secretary and the nature of the reasons which produce it certainly cannot be the absolute determination of the fact as to whether a bridge is or is not unreasonable.

No citizen can be deprived of his property through such a mental impression of the Secretary, merely because he has *good reason* to believe it was an obstruction. To have good reason to believe does not involve a definitive conclusion that he does believe the bridge is unreasonable, for there may be *better* good reasons to show it is not.

Assuming the expression really means that he decides that the bridge is an unreasonable obstruction, had the Secretary of War power to make his finding absolutely conclusive on the courts? The validity of his proceedings and order must, of necessity, depend on the question as to whether the bridge was an unreasonable obstruction and needed changes, and it must necessarily follow that if the court finds that the bridge *was not* an unreasonable obstruction and did *not* need any change, that the Secretary of War had no jurisdiction, and his order was void, and this conclusion is arrived at in several ways:

(1) The Act itself does not make the order of the Secretary of War conclusive on the courts, but it leaves the questions arising on the trial in court to be determined by those methods of inquiry which the courts have adopted as essential to the administration of justice. One of such questions in a case like this necessarily is: By what authority did the Executive Officer determine the fact so definitely that even the Courts cannot examine it? The answer must be the Act of 1899. But a reading of the Act demonstrates that Congress did not say so and that the sole jurisdiction which the Secretary has to order changes is on bridges which *do* unreasonably obstruct. Over bridges which do *not* so obstruct he has no power. He cannot make changes in them.

If then the Brownsville bridge did *not* unreasonably obstruct, the Secretary had no jurisdiction, and his order is void.

(2) The Act of 1899 is explicit in providing that it is only those who

> "wilfully fail or refuse to remove the same or to comply with the *lawful* order of the Secretary of War in the premises,"

that are guilty of a misdemeanor and can be indicted.

There was no express order by the Secretary of War in this case to remove the bridge, but only to change it, and therefore the government must show in order to convict the defendant, that, following the words of the Act of 1899, the order of the Secretary compelling the changes was

"a *lawful* order."

If the bridge, as a fact, was not an unreasonable obstruction to the free navigation of the river, the Secretary

of War should not have required a change to be made, and therefore the order which he made was not a *lawful order*; and therefore the court below should have admitted the evidence to find out whether the bridge was or was not an unlawful obstruction.

(3) All trials in courts of justice where the private property of a citizen is involved must be in accordance with due process of law. This the 5th amendment requires. Admitting (for the sake of argument), that due process of law does not always require judicial proceedings, still when Congress expressly confers jurisdiction upon the courts, then to the extent of that jurisdiction the courts will proceed to perform their duty in accordance with their own settled rules and maxims. They will always administer justice by due process of law.

What is due process of law?

In *Hagar vs. Reclamation District*, 111 U. S., 707, Mr. Justice Field laid it down in this way:

"It is sufficient to observe here, that by 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard *respecting the justice of the judgment sought*. The clause in question means, therefore, that there can be no proceeding against life, liberty, or property which may result in the deprivation of

either, without the observance of those general rules established in our system of jurisprudence for the security of private rights."

Twining vs. New Jersey, 211 U. S. 78, 101.

"The words due process of law were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice."

In *Chicago, Burlington & Quincy R. R. Co. vs. Chicago*, 166 U. S. 226, 234, 236, Mr. Justice Harlan said that the "judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form. * * * * The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation."

Londoner vs. Denver, 210 U. S., 386.

How can the justice of the judgment be determined unless the facts be heard?

How can the court determine the jurisdiction of the Secretary unless it hears the facts?

How is the court on the trial to determine whether the order that was disobeyed was a *lawful* order, without ascertaining the facts and the circumstances under which it was made? How is the court

to determine whether this order did justice to the owner of the bridge, without ascertaining the facts? How could the court deny to the defendant his offer to prove that the Secretary of War had no jurisdiction whatever over his bridge and therefore his order was not lawful?

(4) The owners of the bridge were being tried charged with a crime. It was a criminal trial and the defendant was charged with a misdemeanor. The Federal Constitution provides—Article III, Section II:

"The trial of all crimes except in cases of impeachment shall be by jury."

In the same Constitution (Amend. 6) it is provided:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense."

Attention is called to the fact that Art. 3 embraces

"all crimes"

except impeachment, and Amend. 6 includes

"all criminal prosecutions."

Art. 3 only provides that

"The trial * * * shall be by jury."

Amend. 6 is much more specific and entitles the accused to:

(a) A public trial;

(b) An *impartial* jury of the district where the crime was committed;

(c) To be informed of the nature and cause of the accusation;

(d) To be confronted with the witnesses against him;

(e) To have compulsory process for obtaining witnesses in his favor; and

(f) To have the assistance of counsel for his defense.

What particular crime are these defendants charged with?

The refusal to obey a *lawful* order of the Secretary of War.

Was the order of the Secretary of War a *lawful* one?

The court below held that it was not competent to investigate that. That all it could do would be to see that the Secretary of War had made the order. Whether he had made it lawfully or not *was not for the court to inquire.* Whether or not he had adopted an arbitrary rule to ascertain whether the bridge was unreasonable, was immaterial. Whether he had considered all the facts and circumstances, including the traffic over and under the bridge was immaterial. The mere fact that he had concluded that he had good reason to believe that the bridge was an obstruction to navigation settled the question as to the Secretary's jurisdiction and made his order lawful.

It is submitted that—

(a) Such a trial is but a sham; it is not due process of law; it does not enable the defendant to introduce the facts which would justify its refusal to obey the Secretary of War.

(b) It entirely overlooks the fact that it is only the disobedience of a lawful order of the Secretary of War that convicts of crime. Yet the court below refused to hear testimony to show that the order of the Secretary of War was not lawful but unlawful, and that the Secretary of War had no jurisdiction to make it.

(c) It entirely overlooks the fact that what the Act of 1899 was aimed at was the unlawful obstruction to navigation, and that what the indictment in this case aimed at and what it punished the bridge owner for was the maintenance of such a nuisance. This was so apparent in the discussion of the former case of the Union Bridge Company that the Attorney-General of the United States, in his paper book, stated as follows (pp. 44, 45, Brief of the U. S.):

> "A wilful failure to remove the bridge or to comply with the lawful order of the Secretary of War charges in substance that the Bridge Company during such time has maintained an unreasonable obstruction to the free navigation of the Allegheny River, and has failed and refused to abate the nuisance. If, therefore, the form of the statute alone be regarded, it would seem that the offense prescribed is made to depend upon a violation of an order of the Secretary of War, but when the mere form of the statute is brushed aside

> and the substance of the charge considered, it is clearly apparent that the offense which Congress had in mind was the wilful failure to abate the nuisance."

This being pre-eminently true, it would seem to necessarily follow that the court below erred in holding that the order of the Secretary of War concludes the defendants from proving that the bridge was not a nuisance and was not an unreasonable obstruction to navigation.

Not only does not the Act of Congress make the order of the Secretary of War conclusive on the question of whether the bridge was an unreasonable obstruction, but it submitted that it is extremely doubtful, if the act had so made it, whether that provision would have been constitutional in a case where the citizen is being deprived of his property.

It is obvious that all the power of the Secretary of War over the bridge to order changes to be made, all his power, through the District Attorney, to punish the defendant for not obeying the order, is based upon and necessarily based upon the fact that the bridge is a nuisance, that it is an unreasonable obstruction to the navigation of the river. If it is not a nuisance—if it is not an unreasonable obstruction—then not only does it prove that the order of the Secretary of War was invalid, but there are numerous cases which hold that the question of fact necessarily involved in a judicial proceeding cannot be so definitely decided by an executive officer as to prevent the courts from investigating when the owner of private property is threatened with the deprivation of the same.

The cases which sustain the foregoing reasoning and which declare the citizen's right to a fair, full trial in Court before he can be convicted of a crime are, among others, the following:

Kilbourn vs. Thompson, 103 U. S., 168, 182.

Miller, J.:

"It contains in the provision that no 'person shall be deprived of life, liberty or property, without due process of law,' the strongest implication against punishment by order of the *legislative* body. It has been repeatedly decided by this court, and by others of the highest authority, that this means a trial in which the rights of the party shall be decided by a tribunal appointed by law, which tribunal is to be governed *by rules of law previously established.*"

The decisions of the Supreme Court of the United States under the statutes creating commissions with power to fix rail road rates, held that the power to prescribe a reasonable rate for the future is a legislative function, but that the question whether a given rate violates the private property rights of an individual or a corporation is a judicial function, and cannot be delegated to an administrative or executive body.

Interstate Commerce Commission vs. Railway Company, 167 U. S., 493, 499;

Reegan vs. Farmers Loan & Trust Company, 154 U. S., 397, 399.

Prentis vs. Atlantic Coast Line, 211 U. S., 210, 226.

Rider vs. United States, 178 U. S., 251, where the Bridge Act of 1890 was called in question. There the bridge on the Muskingum River, in Ohio, was declared to be an unreasonable obstruction, and the defendants, who were County Commissioners, were ordered to raise it within a specified time. They did not comply with the order, and on being indicted, the lower court held that their mere failure to comply with the order of the Secretary of War subjected them to the penalties of the Act, and they were found guilty. The Supreme Court, however, held that the defendants were allowed to go outside of the record and show that they were County Commissioners, that they had not the available funds at the time the order was made and could not elevate the bridge within the time required. The Court said (261):

> "Nothing done or omitted to be done by the Commissioners estopped them from making any defense which the facts in the case justified. The liability of the Commissioners to criminal prosecution could not depend upon their mere failure to state to the engineer in charge of the Muskingum River improvements all that might have been urged against the demand made upon them by that officer."

The importance of this case is that the court recognized that the mere making of the order *was not conclusive* upon the defendants, but that they should be entitled to go back of the order and show that the order should not have been made.

In the *City of Salem vs. Eastern R. Co.*, 98 Mass., 461, an action was brought to recover moneys spent by the city to drain certain dams declared by the Board of Health to be a nuisance. The court held that in such an action the party interested was not precluded or concluded by the

findings or adjudication of the Board of Health, but might contest all the facts upon which his liability was sought to be established.

In *Miller vs. Horton*, 152 Mass., 540, an action was brought for the killing of a horse. The defense was the finding of the Board of Health that the horse was diseased and a nuisance. It was held in an opinion by Mr. Justice Holmes that that was not conclusive on the owner of the horse, and that he was entitled to raise that question in Court and have it decided there.

In *Stone vs. Heath*, 179 Mass., which was a case involving the existence of a nuisance and in which the Board of Health had determined that there was such a nuisance, the court held that in the proceeding against the owners of the nuisance to compel them to obey the orders of the Board of Health and remove the nuisance, *such owners had the liberty of proving in court that such nuisance did not exist and were not concluded by the decision of the Board of Health.* (*This is a case quite in point.*)

See also *Lowe vs. Conroy*, 120 Wis., 151; *Pearson vs. Zehr*, 138 Ill., 48; *State vs. Main*, 69 Conn., 123; *Gaines vs. Waters*, 64 Ark., 609, 612.

See also *Due Process of Law* by McGehee, pp. 372 to 376, where the cases are collected.

Quite a collection and review of such cases will be found in the case of *North American Storage Co. vs. Chicago*, 211 U. S. 306, in which the doctrine is maintained that an executive board or committee or officer cannot conclude the owner of private property from proving in court that the

conclusions of such board are mistakes and are not correct; this is especially so where the property involved was alleged to be a nuisance.

Thus in *Fisher vs. McGirr*, 1 Gray, 36, where a statute authorized a police officer to seize intoxicating liquors and provided for their forfeiture before a magistrate, the Supreme Court of Massachusetts, in an opinion by Chief Justice Shaw, held it was unconstitutional because it denied the owner a jury trial.

In the case of *Commonwealth vs. New Bedford Bridge Company*, 7 Gray, 339, an act of the legislature of Massachusetts incorporating a bridge company, authorized the building of the bridge across a navigable river, with suitable draws, and afterwards the legislature passed an act requiring the Bridge Company to make and maintain a new draw sixty feet in width.

Held that the question of fact as to whether the draw originally built was suitable was a question to be determined by the courts under the ordinary rules of law.

In *Rosenberger vs. Harris*, 136 Fed. Reptr., 1003, the Court said:

> "In this government the duty of interpreting the law is devolved upon the courts and every person whose rights are invaded by an administrative or executive officer has a right to challenge the acts of such an officer upon the ground that they are not authorized by the statute under which the officer porports to act."

In *Turner vs. Williams*, 194 U. S., 295, Justice Brewer, concurring, said:

> "I do not believe it within the power of Congress to give to ministerial officers a final adjudication of the right to liberty or to oust the court from the duty of inquiry respecting both law and fact."

In *Colon vs. Lisk*, 153 N. Y., 188, a statute of New York made an interference by any one with the oyster bed of another a misdemeanor, and provided for the summary seizure of boats and vessels used in violation of the act, and gave power to a justice of the peace to seize and sell the vessel. No provision was made for a jury trial, and the court of appeals held that the statute was unconstitutional because it was not due process of law.

The same doctrine was held in *The People vs. Yonkers*, 140 N. Y., 1, where it was said that the Board of Health created under an act in reference to nuisances could not finally and conclusively determine the question of nuisance, as that was ultimately for the courts.

Whether a nuisance exists is always ultimately a mixed question of law and of fact, to be determined by a court:

Cooley's Constitutional Limitations, 7th Ed., 883 and note;
Dillon on Municipal Corporations, 4th Ed., par. 374;
Wood's Law of Nuisances, Sec. 22, 483, 493;
Frostberg vs. Hitchins, 99 Md. 617, 628;
Hutton vs. City of Camden, 29 N. J., 122;
Texas vs. St. Albans, 38 W. Va., 19;
The People vs. Yonkers, 140 N. Y. 1;
Yeates vs. Milwaukee, 10 Wall., 497;
The Mississippi R. R. Co. vs. Ward, 2 Black, 485 492.

In the *Health Department of New York vs. Rector of Trinity Church*, 145 N. Y., 32, Mr. Justice Peckham said:

"Where property of an individual is to be condemned and abated as a nuisance, it must be that somewhere between the institution of the proceedings and

the final result, the owner shall be heard *in the courts* upon that question; or else that he shall have an opportunity when calling upon those persons who destroyed his property, to account for the same to show that the alleged nuisance was not one in fact. No decision of a Board of Health, even if made on a hearing, can conclude the owner upon the question of nuisance."

The decision in the *Bridge Company vs. United States*, 105 U. S., 470, that Congress might itself directly decide the question whether a bridge did substantially and materially interfere with navigation is not in conflict with our defense. Congress did not attempt to declare that the Brownsville Bridge was an obstruction to navigation. Congress did not apply any test by which anyone could determine—the Secretary of War or anyone else—whether in the judgment of Congress the bridge was an unreasonable obstruction or interference with navigation.

The words of the Act of 1899 are that whenever the Secretary of War

"shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise * * * it shall be the duty of the said Secretary," etc.

It will be noted that the words are—

"on account of insufficient height, width of span, or otherwise."

But what is a *sufficient* height, and what is an *insufficient* height; and what the proper width of a span should be, or what the *otherwise* means, Congress does not define.

TRIAL BY JURY.

A public trial, such as Art. 3 and Amend. 6 guarantee to the owner of the bridge being charged with a crime necessarily involves the question of the guilt or innocence of the defendant, and the courts will not pass arbitrarily and convict arbitrarily, when the defendant offers to prove that he is not guilty of maintaining a nuisance, merely on the *ipse dixit* of the Secretary of War to the contrary. The courts must and will of themselves investigate and determine that question.

Article III and Amendment VI, insure a trial by jury which shall pass upon and determine all the essential facts which make up the crime.

In *Callan vs. Wilson*, 127 U. S., 540, 549, 557, Mr. Justice Harlan defined the meaning of the word "crime" in Art. 3 and Amend. 6 as follows:

> "In our opinion, the provision is to be interpreted in the light of the principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury.
>
> "Except in that class or grade of offences called petty offences, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guarantee of an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by or under the authority of, the United States, secures to him the right to

enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offence charged. In such cases a judgment of conviction, not based upon a verdict of guilty by a jury, is void. To accord to the accused a right to be tried by a jury, in an appellate court, after he has been once fully tried otherwise than by a jury, in the court of original jurisdiction, and sentenced to pay a fine or be imprisoned for not paying it, does not satisfy the requirements of the Constitution."

Schick vs. United States, 195 U. S. 65, 70;
Ex Parte Milligan, 4 Wall. 3, 121.

See also cases cited on pages 58, 59.

At common law the owner of a bridge charged with maintaining a nuisance was entitled to a jury trial on the question whether the bridge was an unreasonable obstruction to navigation.

Regina vs. Betts, 4 Cox C. C. 211, 213;
Regina vs. Burt, 11 Cox C. C. 399;
Rex vs. Russell, 6 Bar. & Cr. 566, 587-595;
Regina vs. Russell, 3 El. & Bl. 942, 950;
Rex vs. Tindall, 6 Ad. & El. 143.

In *Schaezlein vs. Cabaness*, 135 Cal., 466, an act of California provided that if any work in any factory be carried on in which dust be generated,

"and it appears to the commissioner of the Bureau of Labor Statistics that such inhalation could, to a great extent, be prevented by the use of some mechanical contrivance, he shall direct that such contrivance shall be provided;"

and if the party refuses to provide, punish him.

There the judgment of the Commissioner was made conclusive by the statute, but the Court said (470):

> "The legislature, as we have said, may require the owners of factories and workships to put their buildings in proper condition as to sanitation; may require them to provide reasonable safeguards against danger for the operatives; but it may not leave the question as to whether and how these things shall be done or not done to the arbitrary disposition of any individual."

So also in *Health Department vs. Rector*, 145 N. Y., 32, where a statute required all tenement houses to be supplied with sufficient water whenever they were directed to do so by the Board of Health, and made it a misdemeanor to fail to comply, the Court of Appeals said that the citizen could not be punished under this Act:

> "Nor can any penalty be recovered from him for an alleged non-compliance with any of its provisions, or with any order of the Board of Health without a trial. The punishment or penalty provided for in Section 665 cannot be enforced without a trial under due process of law, and upon such trial he has an opportunity to show whatever facts would constitute a defense to the charge."

Indeed, if the Court below be correct and the power rests with the Secretary to establish his own test and law, it may be a varying test, this would seem to be utterly at variance with our system of law, as is shown in the following cases:

Yick Wo vs. Hopkins, 118 U. S., 356.

An ordinance of the City of San Francisco as construed by the local courts, gave to certain city officials arbitrary

power to grant or refuse permits to conduct a laundry business, and provided criminal penalties for its violation. This court held the ordinance to be unconstitutional for these reasons:

> "It does not *prescribe a rule* and conditions for the regulation of the use of property for laundry purposes, to which all similarly situated may conform (368).
> * * * *
>
> When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of *purely personal and arbitrary power*. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely *political*, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental *rights to life, liberty, and the pursuit of* happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth, 'may be a government of laws and not of men.'" (369-370).

And this Court further referred to the case of the *City of Baltimore vs. Radecke*, 49 Md. 217, in which an ordinance conferring upon the Mayor the arbitrary power to order the removal of steam engines used in buildings in the City of Baltimore was held unconstitutional, and quoted with approval the language of the Maryland court:

> "It (the ordinance) does not profess *to prescribe regulations*, for their construction, location, or use * * * But it *commits to the unrestrained will of a single public officer the power to notify every person* who now employs a steam engine in the prosecution of any business in the city of Baltimore, *to cease to do so*, and, *by providing compulsory fines for every day's disobedience* of such notice and order of removal, *renders his power* over the use of steam in that city *practically absolute*, so *that he may prohibit its use altogether*.
>
> But if he should not choose to do this, but only to act in particular cases, there is nothing in the ordinance to guide or control his action. *It lays down no rules by which its impartial execution can be secured* or partiality and oppression prevented. * * * In fact, *an ordinance which clothes a single individual with such power hardly falls within the domain of law*, and we are constrained to pronounce it inoperative and void." (372-373).

In the *Louisville Railroad Company vs. Commonwealth*, 99 Ky., 136, the Supreme Court of Kentucky held an act of the legislature of that State void which inflicted a penalty for the railroad company's charging more than a just and reasonable toll or compensation. The Court said (137):

> "There is no standard whatever fixed by the statute or attempted to be fixed by which the carrier may regulate its conduct; *and it seems clear to us to be utterly repugnant to our system of law to punish a person*

for an act the criminality of which depends, not on any standard erected by the law which may be known in advance, but on one erected by a jury. And especially so as that standard must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime."

In the above case, the Court, citing from Mr. Justice Brewer's opinion in the *Chicago Railway Co. vs. Dey*, 35 Fed. 866, also held that a statute under which a penalty is to be inflicted must be certain, definite and such that it can be determined in advance what is prohibited; and that to pass an act charging a person with a penalty for doing an unreasonable thing, and leaving that unreasonable thing to the jury to determine is void. A party must know in advance what the thing is which is to be the crime. (139).

The Federal Courts have jurisdiction to review the decisions of the executive departments on questions of law or of mixed law and fact, though no right of review is expressly given by statute.

THE LAND DEPARTMENT.

Wisconsin Central R. Co. vs. Forsythe, 159 U. S., 46, 61:

"But further, it is urged that this question of title has been determined in the land department adversely to the claim of the plaintiff. This is doubtless true, but it was so determined, not upon any question of fact, but *upon a construction of the law;* and such matter,

as we have repeatedly held is *not concluded by the decision of the land department. Johnson vs. Towsley*, 13 Wall., 72; *Shepley vs. Cowan*, 91 U. S., 330; *Quinby vs. Conlan*, 104 U. S., 420; *Doolan vs. Carr*, 125 U. S., 618, 624; *Lake Superior Ship Canal &c. Co. vs. Cunningham*, 155 U. S., 354."

In *School of Magnetic Healing vs. McAnnulty*, 187 U. S., 94, 108, Mr. Justice Brewer said of the land department:

"* * * *the decisions of the officers of the department upon questions of law do not conclude the courts*, and they have power to grant relief to an individual aggrieved by an erroneous decision of a legal question by department officers."

To the same effect are:

Cosmos Co: vs. Gray Eagle Co., 190 U. S., 301, 314;

Burfenning vs. Chicago, St. Paul etc. Ry. Co., 163 U. S., 321, 323;

Johnson vs. Drew, 171 U. S., 93, 100;

Hardin vs. Jordan, 140 U. S., 377, 401

Williamson vs. United States, 207 U. S. 425, 462.

POST-OFFICE DEPARTMENT.

School of Magnetic Healing vs. McAnnulty, 187 U. S., 94, 110:

Section 3,929 of the Revised Statutes provided that—

"The Postmaster General may, upon evidence satisfactory to him that any person is engaged in conducting any *fraudulent* * * * scheme or device for obtaining money through the mails * * *"

to issue an order not to deliver mail to such person.

Held that the plaintiff might enjoin the enforcement of an order of the Postmaster General based on an erroneous construction of this act. Brewer, J., said:

"* * * his determination that those admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts, and the courts, therefore, must have power in a proper proceeding to grant relief. Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual. Where the action of such an officer is thus unauthorized he thereby violates the property rights of the person whose letters are withheld. * * * The Postmaster General's order being the result of a mistaken view of the law could not operate as a defense to this action on the part of the defendant. * * * Although the Postmaster General has jurisdiction over the subject-matter (assuming the validity of the acts) and therefore it was his duty upon complainant being made to decide the question of law whether the case stated was within the statute, yet such decision being a legal error does not bind the courts."

DEPARTMENT OF INTERIOR.

United States vs. Verde Copper Co., 196 U. S., 207, 214-215:

The Act of Congress prohibited the cutting of timber on public lands, except for certain uses, one being mining. The Secretary of the Interior promulgated a rule that smelting was not mining.

In an action by the United States to recover for timber cut and used by the defendant in smelting, the Supreme Court held that the Secretary's ruling was erroneous, and affirmed judgment for the defendant.

The court said:

> "There is a more absolutely fatal objection to the regulation. The Secretary of the Interior attempts by it to give an authoritative and final construction of the statute. This, we think, is beyond his power. * * * Such power is not regulation; it is legislation. The power of legislation was certainly not intended to be conferred upon the Secretary."

II.

THE COURT ERRED IN RULING THAT THE RECORD IN THE WAR DEPARTMENT WAS CONCLUSIVE, AND THAT THE COURTS COULD NOT EXAMINE THE REGULARITY OF THE PROCEEDINGS BEFORE THE SECRETARY. THE COURT SHOULD HAVE RULED THAT AS THAT RECORD SHOWED THAT THE WAR DEPARTMENT IN THE DETERMINATION OF THE QUESTION WHETHER THE BRIDGE WAS AN UNREASONABLE OBSTRUCTION DID NOT USE A PROPER AND LEGAL TEST OR RULE TO DETERMINE THAT QUESTION, AND AS THE SAME RECORD SHOWED THAT THE SECRETARY OF WAR DID NOT GRANT TO THE BRIDGE OWNERS THE HEARING PROVIDED FOR IN THE ACT OF CONGRESS, AND FURTHER SHOWED THAT SUCH HEARING AS WAS GIVEN WAS BEFORE A PARTIAL JUDGE WHO HAD ALREADY DECIDED AGAINST THE BRIDGE, AND SUCH HEARING WAS CONDUCTED IN AN IRREGULAR AND IMPROPER MANNER, THAT THEREFORE THE ORDER OF THE SECRETARY OF WAR WAS VOID.

(Fifth and Sixth Assignments of Error).

This view of the case assumes that the Secretary *should have used* the rule in the *Escanaba Transportation Co.* in determining the question of unreasonableness.

The record of proceedings in the War Department proves:

(a) That the Secretary did not give the bridge owner an opportunity to be heard, such as the Act contemplates, and did not conduct the hearing that was given according to due process of law.

(b) The Secretary, instead of following the rule established by this Court in the *Escanaba Transportation Case* to determine whether a bridge is an unreasonable obstruction to the navigation of the river, created a new and different rule. Therefore the order of the Secretary of War, which is the basis of the present prosecution, is void, and the case of the Government fails.

The record from the War Department offered in evidence by the Government demonstrates:

(a) That neither the War Department nor Captain Sibert gave any opportunity whatever to the owner of the bridge to be heard *before* the War Department or before Captain Sibert on the original and first reference of the petition to Captain Sibert for examination and report; that Captain Sibert did investigate and report that the bridge was an unreasonable obstruction to the navigation of the river, and decided upon and specified the changes afterwards specified in the order of the Secretary of War; this report was made without the bridge owners even knowing that the matter was being investigated or was under discussion. The Report was considered by the different officers in the War Department and approved by them without the knowledge of the bridge owners and only after this definite investigation and conclusion, was there a recommendation of the Secretary of War that there should be a public hearing before Captain Sibert.

The Act of Congress said that the Secretary of War must give the bridge owners

"reasonable opportunity to be heard."

Assuming that Congress might delegate to the Secretary of War the question of determining as to whether the bridge

was an obstruction, even the Secretary of War must in providing the hearing, follow the ordinary rule which governs in such matters. The most fundamental and essential rule is that the judge who sits upon the case shall be unbiased and impartial. To give the bridge owners a hearing before Captain Sibert, after the captain had spent several months in secret investigation of whether the bridge was an unreasonable obstruction and then in an elaborate report to the Secretary of War, definitely and affirmatively found that it was such an unreasonable obstruction, is hardly the hearing which Congress contemplated. If it is such a hearing that Congress contemplated, it violated the essential rule that a man be not judged until he is given an opportunity to be heard.

Yet in this case, not only Captain Sibert, but the War Department, all concluded that the bridge was an unreasonable obstruction, and only after such a conclusion was there an opportunity to be heard, and then only before an officer who had already decided the case.

Due process of law is defined by Webster in the *Dartmouth College Case* as:

> "A law which hears *before it condemns*, which proceeds upon inquiry and renders judgment only after trial."

And this definition is adopted in

Hovey vs. Elliott, 167 U. S., 418.

In *Stitzel's Estate*, 221 Pa., 230, Chief Justice Mitchell said that parties are

> "entitled to a *fair* hearing before judgment, not *merely to an opportunity to convince a judge who had already prejudged the case.*"

Reynolds vs. United States, 98 U. S. 145, 154.

The hearing given by the Secretary to the bridge owners was before Captain Sibert, who had already prejudged the case. The mode of hearing was most informal, and newspaper extracts seemed the strongest evidence that could be introduced.

(b) This same record also shows that the following test was applied by Captain Sibert and the other officers of the War Department, to determine whether the bridge was or was not an unreasonable obstruction to navigation: They merely considered the bridge at its present height and with its present span, and asked the question: Can all kinds of river craft safely pass under this bridge at all stages of water and when the water is excessively high; would such bridge or such water interfere with the passage of the *packet* boats (*not* tow boats), navigating the Monongahela River; would it interfere with the largest towboats; and having found that during a portion of the year that would be the result, Captain Sibert and the other officers concluded that *therefore* the bridge was an unreasonable obstruction to the navigation of the river. Captain Sibert did not, nor did any of the officers of the War Department, nor did the Secretary of War apply the test laid down in the *Escanaba Company Case*, but established a rule of their own which disregarded the traffic over the bridge and examined only a minute portion of the traffic passing under the bridge, and disregarding all of the facts and circumstances except that packet and towboats might be delayed for several days when the water was extremely high, concluded that that made the bridge an unreasonable obstruction. All traffic over the bridge was disregarded. The fact that the bridge was really a street (80) connecting two towns on opposite sides of the river and was daily used by thousands of persons besides wagons, carriages, etc., was disregarded.

This court has a number of times established the rule as to whether a bridge is or is not an unreasonable obstruction to navigation, and there has been no variation in that rule in all the cases where the question was raised.

In the *Wheeling Bridge Case,* 13 How., 518, Chief Justice Taney in his dissenting opinion said (591):

> "It is sufficient to say, that in all questions of this kind, the general convenience and interest of the public in the travel and trade *across the river,* as well as on its waters, must be taken into consideration. For whether it is a public nuisance or not, depends upon whether it is or is not injurious to the public."

Escanaba Transportation Co. vs. Chicago, 107 U. S., 678, 682.

A regulation of the city authorities required the draw of a bridge crossing a navigable stream to be kept closed during certain hours, to accommodate pedestrians and vehicles, thereby making it impossible for vessels to pass.

It was held that the Navigation Company's rights were not infringed by the regulation, Mr. Justice Field saying:

> "It insists that the navigation of the river and its branches should not be thus delayed; and that the rights of commerce by vessels are paramount to the rights of commerce by any other way.
>
> But in this view the complainant is in error. The rights of each class are to be enjoyed without invasion of the *equal rights* of others. Some concession must be made on every side for the convenience and the harmonious pursuit of different occupations."

In *Bridge Company vs. United States*, 105 U. S. 470, 493, 496, Mr. Justice Field said:

> "There are highways on land in every state, on which a far greater commerce, both interstate and foreign, is conducted, than that which is borne upon its navigable waters * * * In this country the navigation of a river is deemed to be free, when it is kept open for vessels cleared of such physical obstructions as would retard their passage beyond what is *required for the necessary transit over the stream.*"

In *Huse vs. Glover*, 119 U. S. 543, 547, this court said that its decisions established that:

> "*navigable streams were subject to such crossings as the public necessities and convenience might require.* The rivers did not change their character as common highways, if the crossings were allowed under reasonable conditions and so as not necessarily to obstruct them. *The erection of bridges with dams*, and the establishment of ferries for the transit of persons and property, are *consistent with the free navigation of the river.*"

This doctrine was reaffirmed in the following cases:

Gilman vs. Philadelphia, 3 Wall. 713, 729;
Cardwell vs. Bridge Co., 113 U. S. 205, 209;
Mississippi & Missouri R. Co. vs. Ward, 2 Black, 485, 494-495.
Monongahela Navigation Company vs. U. S., 148 U. S., 325.

In *Lake Shore & Michigan Ry. vs. Ohio*, 165 U. S., 365, 368, Mr. Justice White said that the power conferred on

the Secretary of War by the Act of 1899 over a structure built in navigable waters, was merely to

> "direct, *when reasonably necessary,* its modification so as to remove such impediment."

Captain Sibert of the War Department did not observe this rule in passing upon the question of the Brownsville Bridge. He eliminated all facts except the one that the bridge as erected was not high enough to allow packet boats to pass under it at the highest stage of water. He omitted to state that there were only two packet boats that attempted to pass under the bridge, and the passage under it of these largest packet boats was only interrupted for a comparatively few days in the year, and if we had been allowed to introduce the facts, it would have been demonstrated that the conclusion reached by Captain Sibert was, with all due respect, utterly at variance with the public needs and convenience. Many thousands go over the Brownsville Bridge every day, many teams, wagons, horses, etc., daily use it. It is a public street between West Brownsville and Bridgeville, and yet, because during a few days of the year, when the water is exceptionally high, the two packet boats cannot go under it at all hours of the day or night, Captain Sibert concluded that the bridge was an unreasonable obstruction, and the War Department adopted that conclusion.

This demonstrates that the Secretary of War, in the administration of this act of 1899, arbitrarily establishes his own tests and disregards as not binding upon him, the rule that has just been cited, as established by this court.

In the very recent case of *Garfield vs. Goldsby*, 211 U. S., 249, 262, Mr. Justice Day said:

> "* * * as has been affirmed by this court in former decisions, *there is no place in our constitutional system*

for the exercise of arbitrary power, and if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties *aggrieved by such unwarranted* action."

III.

IF THE ACT OF 1899 SHOULD BE SO CONSTRUED AS TO AUTHORIZE THE SECRETARY OF WAR TO APPLY HIS OWN RULE IN DETERMINING WHETHER A BRIDGE WAS AN UNREASONABLE OBSTRUCTION TO NAVIGATION, AND THAT RULE WAS DIFFERENT FROM THE RULE ESTABLISHED IN THE ESCANABA TRANSPORTATION CASE, THEN THE ACT OF CONGRESS WAS UNCONSTITUTIONAL BECAUSE IT VESTS IN ONE AND THE SAME PERSON THE LEGISLATIVE POWER TO MAKE THE LAW AND THE JUDICIAL POWER TO DETERMINE WHETHER THE DEFENDANT HAD VIOLATED THE LAW, AND THIS IS INCONSISTENT WITH OUR THEORY OF GOVERNMENT.

(Tenth and Twelfth assignments of error):

In *Wong Wing vs. United States*, 163 U. S., 228, this court said (237):

"No limits can be put by the courts upon the power of Congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land and unlawfully remain therein. But to declare unlawful residence within the country to be infamous crime, punishable by deprivation of liberty and property, would

be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a *judicial* trial. It is not consistent with the theory of our government that the legislature should, *after having defined an offense as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents.*"

Turner vs. Williams, 194 U. S., 279, 291, 295:

The Secretary of Commerce, acting under the authority of the Alien Immigration Act, ruled that an immigrant was a dangerous anarchist, and ordered that he be deported and confined in prison in the meantime.

The Supreme Court affirmed a decree dismissing the immigrant's writ of habeas corpus on the ground that the evidence received by the Circuit Court showed that he was in fact a dangerous anarchist and that the ruling of the Secretary was correct.

The opinion of the Court, however, reaffirmed the foregoing language of Mr. Justice Shiras in *Wong Wing vs. United States, supra*, and in a concurring opinion, Mr. Justice Brewer said:

> "I do not believe it within the power of Congress to give to ministerial officers a final adjudication of the right to liberty or to oust the courts from the duty of inquiry respecting *both law and fact.*"

Interstate Commerce Commission vs. Brimson, 154 U. S., 447, 485:

The Interstate Commerce Act provides that the orders of the Commission shall be enforced by filing a petition in the Circuit Court to obtain an order compelling the defendant to obey. The Commission filed a petition asking the court to require the defendant to obey its order to answer certain questions and produce certain books. This provision of the act was attacked on the ground that it conferred upon the courts the non-judicial duty of enforcing a mere executive order. The Supreme Court answered this objection by holding that the court exercised judicial power in reviewing the order of the Commission.

Mr. Justice Harlan said (485):

"The inquiry whether a witness before the Commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession and called for by that body, is one that *cannot be committed to a subordinate administrative or executive tribunal for final determination.* Such a body could not, under our system of government, and consistently with due process of law, be invested with authority to *compel obedience to its orders by a judgment of fine or imprisonment.* * * * The performance of the duty which, according to the contention of the government, rests upon the defendants, cannot be directly enforced except by *judicial* process."

Chicago, etc. Ry. Co. vs. Minnesota, 134 U. S. 418, 457.

A statute creating a railroad commission authorized it to fix rates and provided a proceeding in the courts by mandamus to compel obedience to its orders. The state court held that the orders of the commission were conclusive as to the reasonableness of the rate fixed, and that on an application

for a mandamus *the only issue was whether the defendant had complied with the order.* This court held that the statute, as construed by the state court, was unconstitutional, saying:

> "It deprives the company of its right to a *judicial investigation, by due process of law*, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice."

In *Rosenberger vs. Harris*, 136 Fed. Rep., 1003, in the Circuit Court of the District of Missouri, touching the statute giving the Postmaster General *quasi* judicial power, the Court said:

> "He cannot, however, be made the final interpreter of the law. In this government the duty of interpreting the law is devolved upon the courts, and every person whose rights are invaded by an administrative or executive officer has a right to challenge the acts of such an officer upon the ground that they are not authorized by the statute under which the officer purports to act. * * * If an executive officer may himself be both the executor and the final interpreter of the law, then the law becomes what such executive officer declares it to be."

IV.

THE ACT OF 1899 IS UNCONSTITUTIONAL.

This information and trial being based upon a non-compliance by the Monongahela Bridge Company with the order of the Secretary of War, which order it is alleged was made under the provisions of the Act of Congress approved March 3rd, 1899, cannot be maintained, because in respect to these proceedings the provisions of said Act are null and void, for the following reasons:

(a) It attempts to take and destroy the private property of the Monongahela Bridge Company without due process of law, contrary to the provisions of the Constiuttion:

(b) It undertakes to authorize the taking and the destruction of private property for public use without just compensation, contrary to the provisions of the Constition:

(c) It undertakes to unlawfully delegate to the Secretary of War of the United States and to the Chief of the Engineer Corps of the United States Army, both legislative and judicial powers, and this in contravention of the Constitution of the United States.

THE MEANING OF THE ACT OF 1899.

Lake County vs. Rollins, 130 U. S. 662, 670:

"To get at the thought or meaning expressed in a statute, a contract or a constitution, the first resort, in all cases, is to the natural signification of the words, in

the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right *to add to it or take from it.*"

Hawaii vs. Mankichi, 190 U. S. 197, 247.

Harlan, J.:

"We must interpret the law as it is written. As just stated, the doctrine is well settled that when the meaning of a statute is plain, there is no room for interpretation."

Lewis, Trustee vs. United States, 92 U. S. 618, 621:

"Where the language of a statute is transparent, and its meaning clear, there is no room for the office of construction. There shoul be no construction where there is nothing to construe."

The words of the act are as follows:

"That whenever the Secretary of War *shall have good reason to believe that any railroad* or other bridge now constructed, or which may hereafter be constructed, over any of the navigable water ways of the United States *is an unreasonable obstruction* to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats, or other water craft, it shall

be the duty of the said Secretary, *first giving the parties reasonable opportunity to be heard, to give notice* to the persons or corporations owning or controlling such bridge so as to alter the same as to render navigation through or under it reasonably, free, easy and unobstructed; and in giving such notice he shall specify the changes recommended by the Chief of Engineers that are required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time, the alteration has not been made, the Secretary of War shall forthwith notify the United States District Attorney for the district in which such bridge is situated, to the end that the criminal proceedings hereinafter mentioned may be taken. If the persons, corporation or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect, as hereinbefore required, from the Secretary of War, and within the time prescribed by him, willfully fail or refuse to remove the same, or to comply with the *lawful order* of the Secretary of War in the premises, such persons, corporations, or association shall be *deemed guilty of a misdemeanor*, and on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, and every month such persons, corporations, or association, shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation, or association so offending to the penalties above prescribed. Provided, that in any case arising under the provisions in this section an appeal or writ of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court either by the United States or by the defendants."

The questions that primarily arise are:

(1) *Is the statuate presently operative so as to condemn certain bridges, or is it inert and inactive until the Secretary of War acts?*

If the words of the act control, the answer undoubtedly is: the act is *not* presently operative, and is inert and inactive until the Secretary of War acts. It contains no words of general condemnation of unreasonable bridges. It has no words signifying present condemnation. It does not say:

> "Congress hereby and now condemns all unreasonable bridges."

The words are:

> "That *whenever* the Secretary of War shall have good reason to believe"

that any bridge

> "is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, *or otherwise* * * * it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard"

to give notice to the owner of the bridge to alter it.

This surely is prospective—the two words

> "*that whenever*"

the Secretary of War has good reason he shall act, but until he does have good reason to believe, he does not act. No one else but the Secretary of War can act. Congress, if it intended to condemn all unreasonable obstructions to navigation might have said so in the act, but it did not say so. It condemned (if at all) only the bridges that the Secretary of War condemned. What those bridges might be or would be, one Secretary of War might

think one way, and another Secretary of War another, but certain it is that Congress has not authorized the destruction of the bridge until the Secretary of War takes action.

There may be hundreds of unreasonable bridges which the Secretary will never condemn. Are those bridges under this act, nuisances?

If a bridge was indicted as a nuisance under this Act and it was claimed that *as a fact* it was unreasonable and *therefore* was illegal because the Act condemns all unreasonable bridges, would it be possible for the Government to succeed? Or if the legality of the structure in any way came in question could it be successfully claimed that as it was unreasonable Congress had condemned it? And if the answer to both of these questions be in the negative, how is it possible to say that the Act does condemn all unreasonable structures?

(2) The act says that the Secretary of War
"shall have good reason to believe."
What does that mean? Is this "good reason" merely a *prima facie* belief such as an indictment of a grand jury, or is it a settled and confirmed conviction such as the verdict of a petit jury?

If the former, the condition hardly arises which would authorize congress to condemn any bridge. The bridge is private property, and merely because the Secretary of War *suspects* it to be an obstruction, it could hardly be sufficient reason to destroy it.

The words,

"good reason to believe,"

probably will be held to mean a final and confirmed conviction on the part of the Secretary of War.

(3) The Act then says:

"first giving the parties reasonable opportunity to be heard."

What does this mean?

Must this opportunity be given PRIOR to the investigation of the Secretary of War, to determine whether he has good reason to believe, or is it only an opportunity to be heard AFTER the Secretary of War has good reason to believe. Does the hearing given the Bridge Company include the question whether the Bridge is an unreasonable obstruction, or does it refer solely to the changes recommended by the chief of engineers to be made in the bridge?

If the strict rules of construction were followed, the position in the act of the words,

"it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so as to alter the same, * * *"

would mean only the proposed changes, and the hearing would be only as to such changes.

The "good reason to believe" is entirely separated from the reasonable opportunity to *be heard* in the statute itself. The clauses are not connected and do not follow one another.

Assuming, however, that the proper construction of the statute is that a reasonable opportunity to be heard relates

to the good reason to believe (as well as to the changes), at what time in the process of arriving at that conclusion must the bridge owner have an opportunity to be heard? Is it before the Secretary of War arrives at the conclusion that he has good reason to believe, or is it afterwards? Assuming that the construction is that the notice must *precede* the good reason to believe, then the statute requires the Secretary before he concludes that he has good reason to believe to afford the bridge owner, in the words of the act, a reasonable opportunity to be heard.

If he does not afford this his proceedings are in violation of the act.

(4) What is "a *reasonable opportunity* to be heard," and what kind of a hearing does the act prescribe?

The reasonable opportunity must depend on all of the circumstances of the case, and as this opportunity is a condition precedent to the exercise by the Secretary of War of the power conferred upon him by the act, the record should show that he gave that opportunity, and the opportunity he gave was a reasonable one.

(5) What kind of a *hearing* does the act provide for?

As to this the act itself is silent. The words are

"a reasonable opportunity *to be heard.*"

To *be heard* certainly does not merely mean the presentation by the bridge owner of his own evidence showing why his bridge is not an unreasonable obstruction. It surely does not mean merely a hearing to try and convince the Secre-

tary that he had already made a mistake in deciding the bridge was an obstruction. The hearing must be one before an impartial judge; not before one who is prejudiced against your case by his previous action. It must at least include an opportunity to hear and understand why the opponents of the bridge allege that it is an unreasonable obstruction to navigation. The bridge owner should be allowed to cross-examine his opponents, or at least the witnesses they produce.

The hearing should be conducted with at least a fair regard to the established rules which the practice of a hundred years has demonstrated to be the most appropriate way of reaching the truth.

The evidence should be taken under oath.

Newspaper extracts and such like matter which give one no opportunity to test and determine the weight of the person whose opinion is thrown into the scales should not be received.

(6) In this investigation by the Secretary of War, what principle has he by which to test whether the bridge is or is not an unreasonable obstruction to navigation?

The act itself does not declare when the bridge over the Monongahela River, or any other river, is an obstruction to navigation. The act says nothing in reference to the height of the bridge, or the width of the span, or in any shape or form gives a pre-requisite as to the things which will render the bridge an unreasonable obstruction to navigation.

Who, then, determines the test by which it is to be decided?

The act, we see, is silent. The whole matter is referred to the Secretary of War—and so referred without limitation.

This not only follows from the failure of Congress to prescribe any rules by which to determine the question, but it seems to follow from the fact that the only person's mind to be operated upon is the Secretary of War. It is the belief of the Secretary of War, not the belief of the Congress or the courts, or any one else, that the bridge is an unreasonable obstruction that gives the Secretary of War the power to destroy it. He is not under the control, in the exercising of this power, of any other department of the Government. Congress has abdicated as to the question, and the courts have no jurisdiction to prevent his arriving at the conclusion or to direct and control the method in which he shall arrive at it, or the test that he should establish, or how testimony should be taken before him, or what weight should be given to each class of testimony. All these things are solely for the Secretary of War.

Suppose that the Secretary of War would conclude that any bridge less than 80 feet in height over the Monongahela River was an unreasonable obstruction to free navigation of the river, in what way could he be controlled or his conclusions defeated? Is not the Secretary, and especially under the decision in the Union Bridge case and the present case, the arbiter absolute and infallible?

He establishes for himself the rule as to each bridge. He determines for himself as to whether any one bridge falls within the rule. He then makes his order and the courts carry it out—or punish for disobedience of it.

(7) If the Secretary concludes that the bridge is an unreasonable obstruction to free navigation, and the indictment

follows under the act, may the defendant in the trial of the indictment set up and prove, (first) that the bridge is not an unreasonable obstruction to the navigation of the river; (second) that the Secretary of War established a test to determine the question which is in conflict with the doctrine laid down by the Supreme Court of the United States in the *Escanaba Transportation Case*; (third) that it did not have the hearing that the statute provided for; that defendant was not allowed to cross-examine witnesses; that testimony not under oath was taken; that totally irrelevant matter was introduced; that the officers who heard the Bridge Company were not sworn; that they had no specific directions as to what would and what would not in the mind of the Secretary of War create an unreasonable obstruction to navigation, but each of the officers was left to his own ideas as to whether the bridge was or whether it was not an unreasonable obstruction?

If the statute is construed as was done in the Court below and the Secretary makes the law and then applies it to the facts and finally decides, then it is unconstitutional, because it does not furnish an ultimate resort to the courts for the ridge owner whose bridge is threatened.

Public Clearing House, 194 U. S., 515.

See also cases *supra*, p. 77-80.

If on the contrary the Secretary must follow the rule established by this court in the Escanaba Case, then the Secretary acts in a judicial capacity, and the act is unconstitutional, because it delegates to him a judicial power, and gives him power to decide questions of law, which decision of the Secretary the Court below held to be final.

See cases *supra*, p. 59.

(8) The act says that in giving the notice the Secretary

> "shall specify the changes recommended by the chief of engineers that are required to be made, and shall prescribe in each case a reasonable time in which to make them."

It seems, therefore, obvious that prior to this notice the chief of engineers has made plans for the changes in the bridge, and it is difficult to see how he could make such plans without a prior investigation in which it has already been determined that the bridge is an obstruction to navigation, and that changes are required to be made so as to make it a bridge that is not an obstruction. It is apparent that no notice whatever is required to the bridge owner of the changes proposed by the chief engineer until after the chief engineer has passed upon those changes, and then the bridge owner is given a hearing, *not before* the chief of engineers, but before the Secretary of War, to show him that these changes suggested by the chief of engineers are neither necessary nor proper. The burden of proof is cast upon the Bridge Company to combat the already reached opinion of the chief of engineers.

Then this notice as to the changes, the act says, shall also contain this—

> "and shall prescribe in each case a reasonable time in which to make them."

Obviously, therefore, the notice itself assumes

(a) That the bridge is an obstruction:

(b) That certain changes are required to be made; and

(c) That the Secretary of War fixes the time within which such changes shall be made.

And all this as to the kind of changes is done without previous notice.

(9) The act says that if the bridge owner
"after receiving notice to that effect, as hereinbefore required, from the Secretary of War, within the time prescribed by him wilfully fail or refuse to remove the same or to comply with the lawful orders of the Secretary of War in the premises, such persons, corporations or associations shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, and every month such person, corporation or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense and subject the person, corporation or association so offending to the penalties above described."
The misdemeanor then is:

Wilfully *failing* or *refusing* to remove the same, i. e., the bridge.

As no power has been heretofore given to the Secretary of War to remove any bridge (at least in words) this seems to be an enlargement of the powers already given. The Act itself in the prior part of it certainly merely contemplated changes in the bridge so as to render navigation free and easy. The Act did not seem to contemplate the entire condemnation of the bridge and its removal and the building of a new bridge, but these words just read undoubtedly make the refusal of the Bridge Company to remove a bridge an indictable offense.

The failure to comply with the lawful order of the Secretary of War is also an indictable offense.

If the owner does not make the changes the chief of engineers designs, he is also guilty of a misdemeanor.

No discretion whatever is given to the courts. As ruled in the Union Bridge case and the present case the proceedings of the court are very formal: They merely find whether the Secretary of War has given an order at the hearing, and if he has the sole question is: Did you obey the order? Of course, the order must always be based upon the fact that the bridge is an unreasonable obstruction, but in the present case the offer of the defendant to prove that the bridge was *not* an unreasonable obstruction was refused, saying that the action of the Secretary of War was conclusive.

(10) The punishment is an immediate fine of one to five thousand dollars, and every month's delay

> "in respect to the removal or alteration of such bridge shall be deemed a *new offense*, and subject the person, corporation or association so offending to the penalty above described."

That is, after once being convicted of the misdemeanor, which consists in the refusal to obey the Secretary of War, the owner of the bridge is fined five thousand dollars; and then the Act says that every month in which he fails either to remove the bridge or alter the same, it shall constitute

> "a new offense,"

and the person shall again be liable to the penalty of five thousand dollars. For this new offense there is no hearing whatever provided by the words of the Act. It is automatic. Without further inquiry, except to determine the delay, the court punishes by an additional five thousand dollar fine.

It is evident that this five thousand dollars a month, if continued for several years, would eat up the means of any owner of a bridge, and that the failure to obey the Secretary of War is therefore enforced by excessive fines within the ruling of this court in

Ex parte Young, 209 U. S., 123, 163-168.

Wilcox vs. Consolidated Gas Co., 212 U. S., 19, 53-54.

(11) Does this Act of 1899 contemplate an order of the Secretary of War requiring the owner of the bridge to tear down the same and to build a new bridge? And if it does not contain such authority, can the chief of engineers and the War Department, by ingeniously worded orders, evade the real aspect of the case, and yet accomplish the purpose of the destruction of the bridge and the building of a new one?

In all the hearings heretofore had in Pittsburgh the notice given to the bridge company did not in so many words require the removal of the bridge, and yet the practical effect of the changes was to require such removal.

Why did not the order plainly say so?

Take for example, the Union Bridge case: there the order was—

"That the bridge be so *altered* as to give two navigable spans extending riverward from the left abutment of not less than 394 feet clear width each; the second or right-hand span to give a clear head room over the Davis Island pool of not less than 70 feet, and the first span of not less than 50 feet at the pier and 62 feet at the abutment; also that the piers of the altered structure shall

have no riprapping or other pier protection above an elevation of 10 feet below the surface of Davis Island pool, and that all parts of the old structure not comprised in the new construction and in conformity with the above requirements shall be wholly removed."

Evidently this is an order for the alteration of the bridge, and the facts in the case clearly demonstrate that it required the destruction of the old bridge and the building of a new. Why did not the War Department frankly so declare?

In the present case the notice followed that the Secretary had reasonable cause to believe and required that there be made

"the following alterations."

The notice followed—

"so alter said bridge as to give a channel span of not less than 390 feet in length between the face of the right abutment as now located and the center of the pier; and that the said channel span shall give a clearance height of not less than 52 feet above the fourth pool of the Monongahela River."

Now admittedly this requiring the destruction of the old bridge and the building of a new one, why did not the War Department in the order and on the face of it frankly so state?

(12) The notice which the Act requires to be given to the bridge owner, if we follow only the words of the Act, is one which shall specify the changes directed to be made.

This notice is the only one which the Act authorizes the Secretary of War to give; and the Act says that the notice shall be

> "so to alter the same as to render navigation through or under it reasonably free, easy and unobstructed,"

and in giving such notice he

> "shall specify the changes recommended by the chief of engineers that are required to be made, and shall prescribe in each case a reasonable time in which to make them."

The notice then is—

(a) To alter the bridge;
(b) It shall specify the changes;
(c) And shall fix a reasonable time in which to make them.

The only other notice the Act requires is *after* the refusal of the bridge owner to comply with the order of the Secretary of War, and then the notice that is given is to the District Attorney.

CONSTRUCTION IN UNION BRIDGE CASE.

This Court in the *Union Bridge Case* (204 U. S., 387) construed the Bridge Act of 1899 to mean a present condemnation by Congress of all bridges which unreasonably interfered with the free navigation of the rivers, and held that the Secretary of War was appointed the agent of Congress to *pick out* such offending bridges.

This was *a construction* not claimed in the Brief of the Government nor at Bar, and on which we had no opportunity to be heard.

It is with great deference urged that this violates the rules of construction. It introduces into the Act words of *present* condemnation when the Act on its face clearly depends *wholly* on the future action of the Secretary of War before it is effective and before any step whatever can be taken under it. It offends the language of the Act *because* no bridge is *unreasonable* under the Act unless and until the Secretary of War condemns it.

The Act itself in no way defines when a bridge is and when it is not an unreasonable obstruction to navigation. It fixes no standard to determine that. The phrase itself has no sharply defined meaning. All bridges to some extent are obstructions to navigation. Some, as in Philadelphia and Chicago and Paris, prevent large vessels from passing under them, they are not *unreasonable*, because at those particular places the land traffic greatly preponderates and demands a bridge easy of access from the land and easy of passage. To construe the Act as a condemnation of *all* unreasonable bridges is, we most respectfully insist, to overlook the fact—

(1) That Congress has not said *any* bridge is so unreasonable. *Non constat*, but that under this Act every bridge will be found unobjectionable, that not one single bridge will be found unreasonable. It does not define unreasonable nor give a rule by which it can be defined. It does not pretend to mark the unreasonable bridges so that they could be picked out.

(2) The Act leaves the question as to each bridge *solely* to the Secretary of War.

In no way under this Act can one find out what is an unreasonable bridge until the Secretary of War so decides. No matter how unreasonable a bridge may be, as a fact, the Act

does not touch it unless the Secretary acts. *The Act then is not broader than the express affirmative action of the Secretary of War, and is limited exclusively to the bridges he condemns.* The Act itself condemns *no others.*

To attempt to sustain this Act of 1899 by alleging that it is analagous to such Acts where a statute goes into effect only on the happening of some future event, and the future event here is the decision of the Secretary of War is a complete answer to the argument that the statute itself condemns. The statute *could not be presently operative* if it depended for effect on a future event.

With the greatest deference and respect it is urged that to say that the Act is a present general condemnation by Congress of unreasonable bridges is:

(a) To disregard the words of the Act, which are prospective only;

(b) To violate the rule that the inferences to be drawn from the words used must not contradict or be in conflict with the plain meaning of the words of the Act;

(c) To overlook the pregnant fact that before any bridge under the Act can be said to be unreasonable, the Secretary of War must so find. This is the sole and only means. If so how can the Act be said to be a present condemnation of unreasonable bridges, for *non constat*, that any such bridges exist. We cannot know that until the Secretary acts.

Let a bridge be ever so bad, yet if the Secretary of War holds otherwise there is no power whatever under the Act to remove it.

(d) The Act itself gives *no rule* by which a bridge can be picked out; it does not mark the unreasonable

> bridges; it gives no indication as to what they are. It either leaves to the Secretary to establish his own test or it compels him to use the test of the Escanaba Company. Whichever he does, he must investigate, hear evidence and pass upon and decide the question. Surely you can hardly say this is merely picking out.

This *picking out* the unreasonable bridge is at least a novel method of depriving one of private property, and convicting one of crime. If it is applicable to the crime of maintaining a nuisance why is not equally applicable to all other crimes, and the speed with which the criminal may be *picked* out and punished will greatly accelerate the administration of criminal law, if not criminal justice.

See how it would work:

Congress passes an act denouncing all counterfeiting of coins as crimes, and empowers the Chief of the Secret Service to *pick* out the man who does counterfeit. The *picking* him out is only ministerial, but is conclusive against the man so *picked* that he is guilty. Of course the Chief gives to the counterfeiter an opportunity to be heard—but none of the witnesses are under oath—there is no cross-examination, and no method of compelling the attendance of witnesses. The Criminal Court then punishes him and will not listen to his assertion that he is not a criminal, saying, as the Court below did in this case, that question is conclusively settled by the Chief *picking* you out.

Look how the law as to all nuisances could be simplified.

Let, for example, Pennsylvania pass a statute denouncing all unsanitary houses as nuisances, and requiring their re-

moval—and authorizing the Sheriff of each county to *pick* out the houses which are unsanitary. The Sheriff proceeds to and does *pick* out one—and orders the owner to abate it. The owner refuses to do so, and says it is not unsanitary, but the Sheriff, first giving the owner an opportunity to be heard, notifies the District Attorney, who puts in motion the criminal law which punishes the owner of the house, and fines him heavily until he removes the house.

The owner not only loses his property, but becomes a criminal merely through a ministerial mystery of *picking* out.

Indeed, why may not all offences be so punished under the rule thus established?

But this *picking* out process is not only so revolutionary in regard to what has been deemed the protection given by the State and Federal Constitution to private property and personal liberty, but it is using the courts merely as a machine to carry out the orders of the Executive Department of the Government. The Court does not in prosecutions under the Bridge Act investigate the merits. It compels the bridge owner by repeated and large fines to abate his bridge, but will *not* investigate the question as to whether the bridge is an unreasonable obstruction to navigation, saying the decision of the Secretary of War on such question is conclusive.

Is this the public trial, with all its securities, rules and processes for reaching the truth, to which alleged criminals are entitled under the Sixth Amendment? Is this the due process of law which the Fifth Amendment requires before one can be deprived of his property? And is this a fair compliance with Article III, Sec. II, that the trial of all crimes, except in case of impeachment, shall be by jury?

THE POWER DELEGATED BY THE ACT OF 1899 WAS NOT MERELY EXECUTIVE.

The very able opinion in the *Union Bridge case* claimed that the powers granted to the Secretary of War was merely executive and the same as those granted to the President or other officers and sustained by previous decisions.

In all the cases cited the President or the Executive Department exercised political powers deciding political questions, or establishing standards or deciding on qualifications for the admission of persons or property into the United States from a foreign Government. In not a single case cited was the individual owner of property situated within the United States and protected by the Federal Constitution attacked or sought to be deprived of his property by a mere executive proclamation, or an executive determination of a question of fact and law which went to the root of the ownership or the use of private property.

That these decisions involving the exercise of political powers rest on different considerations appears from these cases:

In *Foster vs. Neilson*, 2 Peters, 253, 307, Chief Justice Marshall said:

> "The judiciary is not that department of the government to which the assertion of its interests against *foreign powers* is confided; and its duty, commonly, is to decide upon *individual* rights."

But in *State of Georgia vs. Stanton*, 6th Wall. 50, 76, the court asserted that a case for the exercise of judicial power did exist if

> "the rights in danger * * * be *rights of persons or property*, not merely *political rights*, which do not belong to the jurisdiction of a court."

Wherever a question of law *has* to be decided in a controversy over private property, is it not always a judicial exercise of power—and he who decides, acts in a judicial capacity? Is not the question whether a bridge is lawfully or unlawfully maintained always a question of mixed fact and law? It is no answer to say that Congress, which has only legislative power, might so decide, for that power is specifically given to it.

Thus Congress by the special Act of April 27, 1904, declared the tunnels under the Chicago River to be

> "an unreasonable obstruction to the free navigation * * * and * * * a public nuisance." (201 U. S. 527).

It is not doubted that Congress may pass an Act in which discretion as to its execution may be delegated to another. Some one else may determine some fact which puts the law in motion, but the law itself must be whole when it leaves the hands of the Legislature. If the law itself lacks something to make it a law, then no one else can have the power to fill in the gap:

> Judge Ranney in *Cincinnati R. R. vs. Commissioners,* 1 Ohio, 77.

Now here the Act of 1899 lacks something. It does not define what is an unreasonable bridge. In no way, either by height, width of span, or otherwise, does it designate it. If it did, then by mere measurements the Secretary of War might pick them out.

The Act of 1889 must recieve one of two constructions:

(a) That it gives to the Secretary of War the power to determine the test as to what is an unreasonable bridge;

or

(b) It compels the Secretary of War to use as a test the rule laid down in the *Escanaba Transportation Case.*

The words of the Act are that if—

"The Secretary of War shall have *good reason* to believe that any * * * bridge now constructed * * * is an unreasonable obstruction to the free navigation,"

Now if this means that the Secretary must use the rule established by this Court in the *Wheeling Bridge* and the *Escanaba Transportation Company*, then that rule requires collecting all the facts—comparing the trafic over and under the bridge—the comparative importance of each and how the public convenience would best be served, and from the whole decide.

But this is a mixed question of fact and law:

Mississippi R. R., 2 Black, 492;

Woods on Nuisances, Secs. 22, 493, 748.

See citations page 59.

If so, this would be a delegation by Congress to the Secretary of judicial functions. Such delegation of the power to declare the law is, by this Court, held to be illegal:

School of Magnetic Healing vs. McAnnully, 187 U. S., 108.

Indeed, to say that the Secretary *must* use this rule is to read words into the Act. The Act of Congress leaves the question *solely* and *only* to the Secretary, and it is the Secretary only, and not Congress, that has to be satisfied. Can you deny to the Secretary the right to reach conclusions in his own way, and limit him by a way which Congress did not declare and which is not binding on Congress?

If the Act must receive the interpretation its mere words demand, this would leave to the Secretary of War the power to declare for himself what the rule was by which an unreasonable bridge would be *picked* out. But this would clearly be legislative and therefore void. It would be filling in the gap left in the Act. In addition, it would give to the Secretary executive, legislative and judicial power.

ANALYSIS OF ALL CASES IN THIS COURT WHERE ACTS OF CONGRESS DELEGATED TO OTHERS THE DETERMINATION OF A QUESTION OF FACT, WHICH FACT WHEN DETERMINED PUT IN MOTION THE COMPLETED ACT:

The cases cited by the court in the *Union Bridge Case* as a precedent for its ruling in that case are cases relating to

(1) The suspension of trade upon the ascertainment of certain facts by the President, or the lifting of such suspension upon ascertainment of certain facts; or,

(2) The enforcement of discriminatory duties levied by the tariff law, or release from such duties upon the ascertainment by the President of a corresponding enforcement or non-enforcement of such duties by foreign nations.

(3) Cases under the Embargo Acts, where intercourse with certain foreign nations was prohibited until such nation ceased from illegal interference with our ships, and whether the foreign nation did so cease was left to the President to determine.

(4) Where the right to import, i. e., teas into the United States, was involved. Here Congress forbade all importation except such as comply with a standard.

The cases are as follows:

The Brig Aurora, 7 Cranch, 382. Congress in 1809 (2 S. L., 528) passed what was known as the Non-intercourse Act which forbade trade with England and France, which Act, it was provided, should continue in effect until the end of the next session of Congress, and no longer. By the Act of 1810 (2 S. L., 605) it was provided that unless England and France should change their policy toward trade within three months the President should issue a proclamation declaring the fact that they continued their policies, complained of, and thereupon the provisions of the aforesaid Act of 1809 should be revived. England continued her policies and the President issued a proclamation, and under the revived provisions of the Act of 1809 the cargo that the British shipped was condemned.

Wayman vs. Southard, 10 Wheat. 1, 43, 45, 46.

The point decided in this case was simply that it was not an unlawful delegation of legislative power for Congress to authorize the Federal courts to establish rules to regulate their own practice.

Field vs. Clark, 143 U. S., 649. By the McKinley Tariff Act of 1890 it was provided that certain articles should be imported free of duty unless the President should be satisfied that foreign countries were charging duty upon like articles exported from America to those countries; in which case he should by proclamation suspend such free duties, and certain duties provided for in the Act should then apply. Held, that this was not unconstitutional.

The question in the case did not arise under this conclusion, but the appellants claimed that the whole Act was unconstitutional because that section was void.

In the above case the following Acts of Congress and proclamations issued by the President under them are cited by the Court in its opinion:

(1) The Act of 1874, c. 41 (1 S. L., 372) authorized the President to lay an embargo when Congress was not in session, whenever in his opinion public safety should so require.

(2) The Act of 1798 (1 S. L., 536-566) to like effect.

(3) The Act of 1799 (1 S. L., 613-615), also an Act relating to embargo which could be discontinued by proclamation of the President.

Two proclamations were issued under this Act.

(4) The Act of 1806 (2 S. L., 379) forbade trade with Great Britain in certain articles suspended by the Act of 1809 (2 S. L. 411), which last Act gave power to the President to suspend the former Act still further by proclamation.

(5) The Act of 1815 (3 S. L., 224) providing for the removal of duties whenever the President should find that foreign countries had removed like duties. Several proclamations were issued under this Act.

(6) The Act of 1817, c. 39 (3 S. L., 361) forbade the importation of certain articles in foreign ships, for American ships were not permitted by a foreign country to carry such articles, the Act to be suspended by proclamation of the President whenever the restriction complained of should be removed.

Several proclamations were issued under this Act.

(7) The Act of 1824, c. 4 (4 S. L., 3) relating also to the discriminating duties, with power of the President to suspend upon proclamation.

(8) The Act of 1828, c. 111 (4 S. L., 308), a statute to like effect, with many proclamations issued under it.

(9) The Act of 1830, c. 219 (4 S. L., 425) abolished tonnage duties where foreign nations had done likewise, and the President to determine that fact and to declare by proclamations.

(10) The Act of 1854, c. 269 (10 S. L., 587) related to the admission free of certain articles from certain countries where like privileges were given to the United States, and proclamations were issued under this Act admitting certain articles from New Foundland free from duty.

(11) The Act of 1866, c. 12 (14 S. L., 3), also the Act of 1880, c. 1244 (Section 20, 26 S. L., 616), prohibiting meat cattle and other hides from being imported because of danger of disease, but power given to the President to suspend this Act by proclamation when, in his opinion, such importations could be made without danger.

(12) Section 4228 of the Revised Statutes relates to discriminatory duties, and several proclamations were issued thereunder.

(13) The Act of 1884, c. 121 (23 S. L., 841) relates to discriminatory tonnage duties, with power in the President to suspend by proclamation.

Buttfield vs. Stranahan, 192 U. S., 470, where an Act of Congress authorized the Secretary of the Treasury to fix—

> "uniform standards of purity, quality and fitness for consumption of all kinds of teas;"

and provided that teas under such standards should not be imported. Held: The purpose of the Act was to prevent the importation of a low grade of tea and the fixing of a primary standard below which teas could not come in, and it was a mere declaration by Congress that no teas below the standard fixed by the Secretary should be admitted.

That case did *not* involve the question of private property owned by a citizen of the United States and located in the United States. No one has any right contrary to an Act of Congress to import anything into the United States. The Federal Constitution does not give such right. Yet the Federal Constitution does protect private property, and even the United States in order to destroy such property, must obey the rules there laid down.

Then, too, the absolute necessity of providing a practical test, in accordance with the methods in common use, was the ground upon which the case was finally put, Mr. Justice Harlan saying:

> "Congress legislated on the subject as far as was *reasonably practicable*, and from the *necessities* of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute."

A different ruling was made in the following cases:

U. S. vs. Matthews, 146 Fed., 306, the Act of 1897 (30 S. L., 34), making it a criminal offence to violate any rule or regulation which should be made by the Secretary of the In-

terior under the powers given under that Act for the protection of forest reserves is void as an attempted delegation of legislative power to an administrative officer.

See a like case, *U. S. vs. Ormsbee*, 74 Fed., 207; *U. S. vs. Grimaud*, 170 Federal, 205, holding that a law which makes it a criminal offence to disobey rules and regulations established by the Secretary of the Interior for protection of forests is void as being a delegation of legislative power.

Differences between the case at bar and cases cited.

It seems reasonably clear that the present case is markedly different from all the other cases cited, and among others, in the following respects:

(a) The Bridge Company is a corporation or an individual citizen of the United States owning private property, protected by the Federal Constitution, and of which he or it cannot be deprived without due process of law, and which cannot be taken from him for public use without due compensation.

(b) He or it as the owner of the bridge cannot be convicted of any criminal act in regard to it without a public jury trial and is entitled to a trial by jury under settled principles of law.

So much is assured by the Sixth Amendment and Article III.

(c) He or it as a Bridge Company is within the protection which forbids excessive fines or unusual punishment. (Amend. VIII).

(d) The Bridge Company is not asking to import anything into the United States—or asking for a pension—or claiming some tariff privilege—or some gratuity—or seeking some favor from the Government.

It relies on its Constitutional rights to private property and its Constitutional right to maintain its bridge where it is unless and until by strictly Constitutional methods it is deprived of the same.

All the relevant cases cited involve in one shape or another admission to, or privileges in, or from the United States, which the Government may grant or refuse at its pleasure.

V.

THE ACT IS UNCONSTITUTIONAL BECAUSE IT REALLY TAKES PRIVATE PROPERTY FOR PUBLIC USE WITHOUT COMPENSATION.

(Seventh, Eighth and Ninth assignments of Error).

It is with the greatest respect for the opinion of this Court in the *Union Bridge Case*, where this question was raised and discussed and decided by a majority of the Court, that we again submit to the Court the following propositions:

(1) That the power of Congress in its regulation of commerce is limited by other clauses in the Federal Constitution.

Monongahela Navigation Co. vs. U. S., 148 U. S., 312.

(2) The word "taken" in the 5th amendment where the proceedings are under the Interstate Commerce clause, should not receive a strict technical, narrow definition which enables a great and wealthy nation to destroy the property of its citizen without compensation. *Pumpelly vs. Green Bay Co.*, 13 Wall. 177. This Court should construe this Act of 1899 so as to prevent the destruction of private property without compensation being given to the owner.

It is essentially unjust that a great Government should destroy the private property of its citizens when such destruction is for the benefit of all the citizens of the United States. It makes one citizen carry the burdens that ought to be equally shared by all the people.

This Court said in *Monongahela Navigation Co. vs. United States*, 148 U. S. 312, 325:

> "And in this there is a natural equity which commends it to every one. It in nowise detracts from the power of the public to take whatever may be necessary for its uses while on the other hand, it *prevents the public from laying upon one individual more than his just share of the burdens of government*, and says that when he surrenders to the Government something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him."

To notify a man that he must remove his bridge and thus destroy it and destroy its earning power just as effectively *takes from him his property* as if the Government went into bodily possession, and it is not the case of in-

cidental and remote consequences following a lawful act done under the police power, such as are the Western Cases relied on in the *Union Bridge Case.*

When the Government compels one of its citizens to spend money in the re-construction of his bridge, this is taking from the citizen his money—compelling the citizen to part with his money—just as effectively as if the money was actually taken by some officer of the Government.

West Chicago Ry. Co. vs. Chicago, 201 U. S. 506—
Holmes, J.

The Government practically invited and acquiesced in the construction of the bridge. The bridge became really a part of a link in the National Pike which Congress built and over this bridge went the traffic coming to it and as a part of that Pike.

It should not therefore be destroyed by the Government without compensation.

Monongahela Navigation Co., 148 U. S. 312.

It is suggested that the powers of the Secretary of War and the Government itself over navigable streams naturally divide themselves into two functions, one to prevent encroachments upon or obstructions to the stream, which might be held to be executive or administrative functions, the other relating to an alleged improvement to navigation by the removal of structures from the stream, which were lawful when they were made but by reason of some change of facts or of law have been subsequently thought to have become unreasonable, and while in the one case it might be perfectly proper for the Legislature to confide the custody of the streams to

the Secretary of War and see that no new bridge should be built unless it met his approval, that when you undertake to provide for the destruction of property such as a bridge, dock or a dam which was originally constructed by lawful authority and upon the contention that it has since become a nuisance by reason of some change either in the fact or the law, necessarily such a question is a judicial question.

Then, too, it is also urged that this case is not ruled by any of the cases cited in the Union Bridge Case on the question of whether the facts here bring it within the word TAKEN.

The Government here does two things:

(a) In effect, orders you to tear down your bridge.

(b) Orders you directly to expend your money in the reconstruction of it.

If the Government itself destroyed the bridge, that would be a taking. When the Government orders the owner to destroy it, and enforces its orders by a sentence as for a crime, is there any real distinction so far as the taking is concerned?

If the Government orders the Bridge Company to expend its money in the reconstruction of the bridge, and compels it to do so—if the Government through one of its agents put its hand into the treasury of the Bridge Company and took its money,—that would be a real taking, and notwithstanding, it was taken merely to be used in the reconstruction of the bridge. When the Government compels the bridge owner to use his money in the reconstruction of the bridge, why is it not practically the same?

Another construction of the Act as to the question of compensation is this:

(a) Every intendment is that Congress did not intend any violation of either the letter or the spirit of the

constitutional provision against the taking or deprivation of property without due process of law or without compensation.

(b) The question of whether the citizen has a property right,—whether the thing in respect of which he suffers the injury complained of is *property*,—depends in this case upon a question of fact, viz: whether the bridge is or is not what the law denounces as a nuisance, and that question in turn, when presented to a court, must be decided in accordance with legal rules.

(c) If the bridge be not in law a nuisance, then it is property, and the citizen is entitled to the protection of the constitutional provision. On the other hand, if, as in the Union Bridge Case, the bridge be conceded or assumed to be in point of fact a nuisance, no property right is involved.

(d) A property right being then shown to exist,—and rights involving millions of dollars worth of property which is to be destroyed if the construction of the Act of Congress contended for by the Government should prevail, the court should so construe the Act as to limit its provision to those cases involving bridges which are in law nuisances.

(e) That where the right of a citizen to the protection of a constitutional provision arises, no decision of any administrative officer as to a question of fact upon which that right depends, can be made conclusive. The cases in regard to the decisions made by the Postmaster General in fraud-order cases would seem to me strongly indicative the other way.

As so construed, the Act would not be subject to objection as violating the constitutional provisions mentioned; at the same time, the functions of the courts would be fully preserved and full effect

given to that provision of the Act which provides only for the enforcement of the *lawful* orders of the Secretary of War.

Pennsylvania has never complained that the Bridge Company had disregarded the terms of its charter forbidding interference with navigation, and this, so far as the charter is concerned, is conclusive on the United States.

The Bridge Company is the owner of private property. Its bridge lawfully exists. It was erected under state authority, and the state alone has the power to enforce the provision of its charter. The state never has claimed that the bridge obstructed navigation.

This Brownsville Bridge, erected in 1832, under an Act of the General Assembly of the State of Pennsylvania, approved March 16, 1830, P. L. 102, and ever since maintained and used in connection with the National Pike as a highway, was, when the present proceedings were instituted by the Secretary of War, a lawful structure, and the private property of the Monongahela Bridge Company. Pennsylvania had power to authorize the structure.

Peoples vs. Rensalear R. R. Co., 15th Wendell, 113-131.
Wilson vs. Blackbird, 2nd Peters, 250;
Willamette Iron Bridge Co. vs. Hatch, 125 U. S., 2.

In *Lake Shore Company vs. Ohio*, 165 U. S., 365, this court said

"That full power resides in the states as to the erection of bridges and other works in navigable streams

wholly within their jurisdiction, in the absence of the exercise by Congress of authority to the contrary, is conclusively determined."

Gilman vs. Philadelphia, 3rd Wallace, 713.

This improvement being of a local nature, the inaction of Congress in taking jurisdiction and control of the Monongahela River, on its part must be

"deemed a declaration that for the time being and until it (Congress) sees fit to act they may be regulated by state authority."

Mobile vs. Kimball, 102 U. S., 697.

As the State of Pennsylvania authorized the construction of the Brownsville Bridge, and has in nowise complained that it is an unlawful structure, or that it obstructs the navigation of the Monongahela River, it will be conclusively presumed in the Federal Courts that the bridge was lawfully constructed and is a lawful structure of the State of Pennsylvania.

Willamette Iron Bridge Co. vs. Hatch, 125 U. S., 2:

In that case, considering a bridge which it was claimed was not in accordance with the charter granted to it by the state, this court said:

"The failure of state functionaries to prosecute for breaches of the state law does not confer power upon the United States functionaries to prosecute under a United States law when there is no such law in existence."

VI.

THE NATIONAL PIKE.

The court erred in refusing to rule and instruct the jury in accordance with the request contained in defendant's Sixth Point, which point was as follows:

> "Sixth. From the evidence in the case the jury may find that the United States, both by its executive and legislative departments, invited, acquiesced in and approved of the erection of the Monongahela Bridge as it now stands, and if they so find, and also find that the Government made it a part of the National Highway, and it was used as such, the defendant cannot be compelled by the order of the Secretary of War to change the bridge and alter the same at its own expense, as provided in said order, because that would be taking the private property of defendant without due process of law and without compensation."
>
> (Eleventh Assignment of Error.)

This point is based on the doctrine laid down in *Monongahela Navigation Co. vs. United States*, 148 U. S. 312, 335. In that case the Government constructed dams above and below the dam of the Navigation Company, thereby making the latter the connecting link in its system of improvements. This court held that the Government could not later say that the dam of the Navigation Company was an obstruction and wrongfully in the river, and was obliged to make compensation for the same.

On March 29th, 1806, Congress passed an Act to lay out a road from Cumberland in the State of Maryland to the River Ohio, to strike the same at the most convenient place

near Steubenville or Wheeling. The dimensions of the road were given (72), and a commission was authorized to be appointed to lay the road out. Such commission was appointed and reported in favor of the road from Cumberland, running across Laurel Hill in Pennsylvania

> "thence to Brownsville and Bridgeport, across the Monongahela River. * * *"

President Jefferson, in a message to Congress February 19th, 1808 (74), approved of the location of this route through Brownsville.

Subsequent other Acts of Congress appropriating money for the making of this road are all in evidence (75).

In the building of the Pike it was intended to throw a bridge across the Monongahela River, but as a fact the National Pike was constructed to a point near Dunlap's Creek, below the site later chosen for the defendant's bridge, and the travel on said Pike across the river was by ford. But after the bridge was constructed by the defendant company in 1833, the United States Government erected an iron bridge over Dunlap's Creek, and built an extension to the National Pike, carrying it up to and connecting it with the bridge of the defendant company along the original route (78-80).

Attached to the printed record at page 124 is a copy of the plan submitted in 1835 by the military officers in charge of making these improvements to the Chief of Engineers of the United States Army, and approved by the latter (76, 77). The old route running to the road below Dunlap's Creek is indicated on the plan by black dotted lines; the new route and bridge over Dunlap's Creek carrying the National Pike up to the defendants' bridge is indicated by broad red lines.

The court below in its opinion found these facts as follows (11):

> "This bridge was built in 1832, under a charter from the state of Pennsylvania, and is located on the line of the Old National Pike, laid out by the Federal Government in 1807, to give better access to the then distant parts of what is now the Middle West. It closes the gap in the road made by the river, the necessities of travel before that being met by a ferry, and after its construction the ends of the road leading to the ferry were relocated, so as to connect with the approaches to the bridge, which *was thus adopted and made an integral part of the thoroughfare.*"

CONCLUSIONS.

It is urged that the following conclusions should govern this case:

(a) Neither the legislative nor the executive nor the judicial departments may invade the other;

(b) No one of these departments may delegate its power to the other;

(c) The legislative department makes the law; the judicial department construes the law, and the executive department enforces the law.

(d) To some extent the judicial not only construes but enforces, as against the individual, the law, and punishes the individual for the violation of it;

(e) The executive and the legislative departments are the political divisions of the Government, and in a general way between them they have charge of all political questions concerning the policies of the nation and relations of the nation to foreign powers, treaties with foreign powers, etc. The judiciary has charge of the construction of all laws which relate to the *persons* and the *property* of *the individual citizen,* and its chief purpose is the administration of justice, not only as between the individuals who compose society, but also as between governments (such as the United States and the State Government) and between the individual and the state or the United States Government. Through different devices the Government may attack and threaten the property or person of the individual, and the courts have jurisdiction to determine as to the right and justice; and this question of the right of the individual to the property and the right of the Government to take or destroy his property is not executive.

In *Patton vs. Brady,* 184 U. S. 620, the ourt said:

"The legislative makes, the executive executes, and the judiciary construes the laws. Chief Justice Marshall, in *Wayman vs. Southard,* 10 Wheat. 1, 46. The legislature must therefore determine all questions of state necessity, discretion or policy involved in ordering a tax and in apportioning it; must make all the necessary rules and regulations which are to be observed in order to produce the desired returns, * * *"

In *Kilbourn vs. Thompson,* 103 U. S. 182, speaking of the constitution, the Court said (182):

"It contains, in the provision, that no 'person shall be deprived of life, liberty or property, without due pro-

cess of law,' the strongest implication against punishment by order of the legislative body. * * * It has been repeatedly decided by this court, and by others of the highest authority, that this means a trial in which the rights of the party shall be decided by a tribunal appointed by the law *previously* established. An act of Congress which proposed to adjudge a man guilty of a crime and inflict the punishment, would be conceded by all thinking men to be unauthorized by anything in the Constitution."

(f) Under the Interstate Commerce clause of the Constitution Congress may itself declare that any bridge is an obstruction to navigation and may itself declare what shall constitute an obstruction to navigation, and may itself declare what is an unreasonable obstruction to navigation. Having so declared, it possibly may authorize the executive department to execute the law as it might authorize an agent directly selected by itself so to do, and it is therefore possible that having itself marked and defined exactly what an unreasonable bridge is, and when a bridge is an unreasonable obstruction, Congress could delegate to the Secretary of War the power to see what bridges were so marked and came within the exact definition of Congress. As, for example, if Congress passed an Act that every bridge under 60 feet clearance or with any span less than 300 feet wide was a nuisance; but even in such case the owner of the bridge could appeal to the Courts to contest the fact. But in this Act of 1899 Congress did not define *what* will make any bridge an unreasonable obstruction. It does not prescribe the heighth of a bridge, the location of its piers, the width of span, or any other certain definite thing. It does not *even* adopt the rule laid down in the *Escanaba*

Tranportation Co. Case or the *Wheeling Bridge case.* It gives wholly and without restriction the powers to the Secretary of War to establish his own rule or test to determine when a bridge is an unreasonable obstruction.

(g) The act of 1899 in providing for a hearing required the Secretary of War to allow such hearing before an impartial judge who would conduct the same with a due regard to the ordinary rules to ascertain the truth.

If the Act of 1899 is construed to authorize the Secretary of War to adopt his own rule or test to determine whether the bridge is an unreasonable obstruction, then the Act is unconstitutional, because:

(1) It is the delegation to the Secretary of War of legislative power, i. e., the making of the law;

(2) Of judicial power, i. e., applying the facts to the law which he had already made, and drawing his conclusions;

(3) The union of the legislative and the judicial and the executive powers in one person is inconsistent with our theory of government.

(h) If, on the other hand, it is said that the Secretary of War must adopt the rule laid down in the *Escanaba Transportation Company* and other cases cited, (pp. 74-75) that in order to determine whether the bridge is unreasonable, all the facts must be considered, and the traffic over the bridge compared with the traffic under it, then the Act delegates to the Secretary of War judicial power, i. e., the determination of the law as well as the facts, and this is unconstitutional.

The existence of a nuisance always involves a question of law for the Court.

Mississippi R. R. vs. Ward, 2 Black 492.
Wood on Nuisances, Sec. 22, 493, 748.

See cases page 59.

(i) If the Act of 1899 be construed as giving to the Secretary of War the final power to pass upon and decide that the bridge is an unreasonable obstruction, and denies to the citizen the right of appeal to the courts, then it is void, because it denies to the citizen due process of law, and destroys, if it does not take, his property, without due process of law, and denies to the citizen the right of trial by jury granted to him by the Federal Constitution.

The question as to whether the bridge is an unreasonable obstruction is one for the Courts to determine on prosecutions under the act and if the owner of the bridge can in court prove that it is not an unreasonable obstruction then the prosecution fails.

(j) The refusal of the Court below to receive the offer of the bridge owner to prove that the bridge was not an unreasonable obstruction to navigation and no change in it was necessary, was error.

The charge to the jury that they must assume the bridge was an unreasonable obstruction because of the decison of the Secretary of War, was error.

The ruling that the Court could not examine into or question the proceedings before the Secretary of War,

or inquire whether he used the proper test, or whether he gave a proper hearing, or whether the hearing was before an impartial judge, were each and all errors.

(k) The Act of 1899 provides for a hearing before an impartial judge and in a rational method to ascertain the truth. Both of these were denied in the present case.

(l) Under the facts there was really a taking of the bridge and the money of the owners for public use without compensation.

Corporations are within the followi. g provisions and amendments of the constitution:

Article III, Sec. 2, Cl. 3:

"The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed."

Amendment VI.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

Amendment VII.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

Amendment VIII.

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

Armour Packing Company vs. United States, 209 U. S., 56, 73, 76, 89:

Defendant corporation was indicted in the Western District of Missouri on a charge of rebating, and set up in defense that the offense was complete in the state of Kansas. It invoked the protection of the Sixth Amendment guaranteeing in all criminal prosecutions the right to trial by a jury of the state and district in which the crime was committed.

The majority opinion, without intimating in any way that a corporation was not entitled to the protection of this amendment, held that the offense was a continuing one and so committed within the district where the indictment was found. But the minority opinion stated expressly that the Sixth Amendment was applicable.

Mr. Justice *Brewer* said (89):

"I am authorized to say that the *Chief Justice* and Mr. Justice *Peckham* concur in this dissent. They are also of the opinion that the trial court, the District Court of the Western District of Missouri, has no jurisdiction of the alleged offense. * * * The *Constitution* has made provision for the venue of criminal actions or prosecutions, and their nature cannot be altered by legislative enactment."

American Publishing Co. vs. Fisher, 166 U. S., 464:

A corporation appealed from a judgment against it entered on a verdict of nine members of a jury in accordance with a statute of the territory of Utah. The statute was held to violate the Act of Congress providing that in territorial courts "no party * * * shall be deprived of the right of trial by jury, in cases cognizable at common law."

The Supreme Court also held that the case was within the provisions of Amendment VII, but left open the question whether the amendment was applicable to the territory.

Mr. Justice Brewer said:

"Therefore, either the Seventh Amendment to the Constitution, or these Acts of Congress, or all together, secured to every litigant in a common law action in the courts of the Territory of Utah the right to a trial by jury, and nullified any Act of its Legislature which attempted to take from him anything which is of the substance of that right."

In *Wilcox vs. Consolidated Gas Co.*, 212 U. S. 19, 53-54, this Court held that a corporation was protected by Amendment VIII against a statute imposing excessive penalties.

Fidelity & Deposit Co. vs. United States, 187 U. S., 315:

A corporation appealed from a judgment for want of an affidavit of defense, on the ground that the rule of court authorizing it deprived it of its right to trial by jury in contravention of the Constitution of the United States.

The Supreme Court, without in any way intimating that a *corporation* was not protected, held that the rule of court did not deprive the right to a jury trial within the meaning of the Federal Constitution.

Capital Traction Company vs. Hof, 174 U. S., 1, 4:

A corporation appealed from a judgment of a justice of the peace, alleging that the Act of Congress conferring on justices of the peace jurisdiction over claims not exceeding $300.00 deprived it of the right to trial by jury guaranteed by the Seventh Amendment.

The Supreme Court in an elaborate opinion by Mr. Justice Gray, which asserted impliedly that the Amendment applied to corporations, held that the statute was constitutional.

In each of the following cases, in which a corporation invoked the protection of Amendment VI or VII, the court dis-

cussed the question without intimating that these amendments were not applicable to corporations:

Nashville, etc., Ry. Co. vs. Alabama, 128 U. S., 96, 101 (Art. 111, sect. 2, cl. 3).

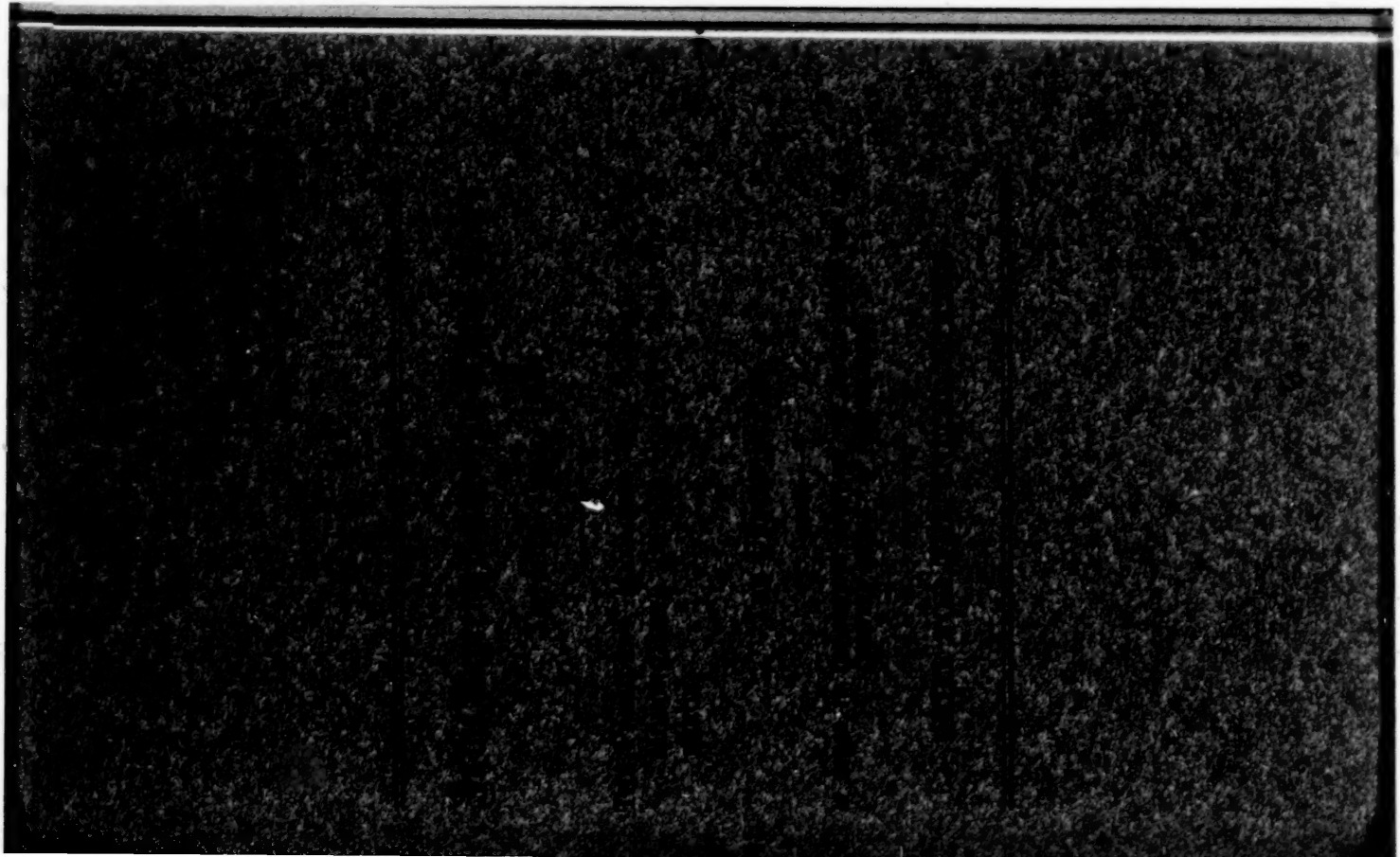
United States vs. Union Pacific R. R. Co., 98 U. S., 569, 603 (Art. III, sect. 2, cl. 3 and Amend. VI).

Employers' Liability Cases, 207 U. S., 463, 503 Amend. VII).

Guthrie Nat. Bank vs. Guthrie, 173 U. S., 528, 537 Amend. VII).

Arkansas Cattle Co. vs. Mann, 130 U. S., 69, 73 Amend. VII).

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In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THE PRESIDENT, MANAGERS, AND COMPANY of the Monongahela Bridge Company, plaintiff in error,
v.
THE UNITED STATES.
No. 91.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR THE UNITED STATES.

Independently of the presence of a question concerning the construction or application of the Constitution of the United States, this case has properly come directly to this court under the express allowance of such direct appeal by the act of March 3, 1899, sec. 18 (30 Stat., 1121, 1153–1154).

The following statement will bring the really controlling facts into prominence:

1. The corporation plaintiff in error was chartered in 1830 by the State of Pennsylvania (Rec., 51), and the bridge was built under that charter in 1833

(Rec., 78). Plaintiff in error never received any charter from Congress, nor was any congressional sanction ever given to the bridge.

2. The state charter of plaintiff in error expressly provides "that the erection of said bridge shall not obstruct the navigation of said river so as to endanger the passage of rafts, steamboats, or other water craft." (Rec., 51, 52.) (Pennsylvania Laws of the session of 1829–30, p. 105.)

3. The Monongahela River had been declared a public highway for navigation by the people at large, by express statutes of both Pennsylvania and West Virginia, before plaintiff in error was chartered.

An act of Pennsylvania, passed April 17, 1782, provided, concerning the Monongahela and Youghiogheny rivers, as follows:

> SEC. 4. And be it further enacted by the authority aforesaid that the said rivers so far up as they or either of them have been or can be made navigable for rafts, boats, and canoes, and within the bounds and limits of this State, shall be, and are hereby, declared to be public highways. (2 Dallas' Laws of Pennsylvania, 58; printed at Philadelphia in 1793.)

And so early as 1725 it was enacted:

> And whereas the erecting of bridges over creeks or rivers of water, to the obstruction of their navigation, where navigable, doth not only affect the interest of the owners of lands upon and near navigable waters above those bridges, but also the trade of this province in general; and the better to preserve the navi-

> gation of those rivers and creeks, divers laws of this province have from time to time been enacted, but the same upon experience have been found not wholly to answer the ends thereby intended; be it therefore further enacted that no bridge, frame, or device whatsoever shall at any time to come be made, erected, upheld, sustained, or repaired over any creek or river within this province navigable for any sloop, shallop, flat, or other craft, that shall or may in anywise stop or hinder the navigation of any such sloop, shallop, flat, or other craft, or floats of logs; any law, custom, or usage to the contrary thereof in anywise notwithstanding. (1 Dallas' Laws of Pennsylvania, 227.)

An act of March 24, 1817, provided for incorporation of a company "to make a lock navigation on the river Monongahela." (Ch. 159, laws of the session beginning Dec. 3, 1816, p. 241.)

Another act for the same purpose was passed April 2, 1822; and in section 1 it required the commissioners appointed by it "to cause to be removed all obstructions which impede or injure the navigation of the said river Monongahela by making a slope or inclined navigation from the Virginia state line to its junction with the Allegheny River." (Ch. 107, Laws of the session beginning December 4, 1821, p. 136.)

The Mill-Dam Act of Pennsylvania, passed March 23, 1803, provided:

> That all and every person or persons owning lands adjoining any navigable stream of

> water, declared by law a public highway, except the rivers Delaware, Lehigh, and Schuylkill, be, and they or either of them are hereby, authorized to erect a dam or dams for a mill or mills or other waterworks upon any such stream of water adjoining their own lands and to keep the same in good repair, and also to lead off thereby on his or their own land so much of the water of such stream as may be necessary for his or their mill or mills or other waterworks; provided that the said person or persons, his or their heirs and assigns, in erecting the said dam or dams or keeping them in repair shall not obstruct or impede the navigation of such stream or prevent the fish from passing up the same; and provided also that the person or persons so erecting said dam or dams shall not infringe on or injure the rights and privileges of the owner or possessor of any private property on such stream. (7 Laws of the Commonwealth of Pennsylvania, republished under authority of the legislature by John Bioren at Philadelphia, 1806, pp. 43, 44.)

The State of Virginia too had made the Monongahela River by law a "public highway free for navigation" as early as 1800, an act of January 20, 1800, declaring—

> That the Monongahela River from the south boundary line of Pennsylvania, up to the confluence of the rivers of Tyger Valley and West Branch, thence up the Tyger Valley River to John Nusum's mill, and up the West Branch River to Edward Jackson's mill, and up Simp-

sons Creek to Benjamin Wilson's mill, and up Elk Creek to George Jackson's mill, shall be forever considered and taken as a public highway, free for navigation.

If any person or persons shall place or put any obstruction to the navigation of the said rivers or creeks, within the distance aforesaid, he or they shall, for every such offence, forfeit and pay the sum of fifty dollars for every month such obstruction shall remain therein, to be recovered in any court of record in this Commonwealth, with costs, by action of debt or information, and applied one moiety to the use of the person prosecuting, and the other moiety to the justices of the court of that county where the suit shall be tried, to be by them applied towards improving the navigation of the said rivers and creeks. (Ch. 57, Laws of Virginia, at session begun December 2, 1799; p. 243, 2 Stat. at Large of Virginia, by Samuel Shepard, published at Richmond in 1835.)

The Monongahela, therefore, was by law a publicly navigable river before plaintiff in error was chartered by Pennsylvania.

The interest of the Pennsylvania legislature in the Monongahela River as a public waterway did not stop, however, with the foregoing statutes. On March 31, 1836, an act was approved "to authorize the Governor to incorporate a company to make a lock navigation on the river Monongahela." (Act No. 85 of the laws passed at the session of 1835–36, pp. 262–273.)

This continued the plan of bettering the navigation of the river which had been begun by the acts of 1817 and 1822, above mentioned.

The company was empowered "to form and make, erect and set up, any dams, locks, or any other device whatsoever which they shall think most fit and convenient to make a complete slack-water navigation between the points herein mentioned, to wit, the city of Pittsburg and the Virginia state line." (Sec. 8.) The State, in incorporating a state bank to be called the United States Bank (act No. 22 of laws of session of 1835–36), required that bank to subscribe to the capital stock of this Monongahela Navigation Company in the amount of $50,000. (Pennsylvania Laws of 1835–36, p. 43.)

By an act of March 30, 1860, the Pennsylvania legislature required that—

> All companies or corporations having or owning or which may hereafter have or own any bridge or other structure spanning the Monongahela between its confluence with the Allegheny River and the borough of Elizabethtown, in the county of Fayette, are hereby required to keep a light or lights burning from dark till daylight throughout the night, on each pier of each bridge or structure, so that said light or lights may be readily seen at all hours of the night by persons navigating said river. (Pennsylvania Laws of 1860, p. 378.)

And this last-mentioned act further provided:

> That nothing contained herein shall be so construed as to affect the liabilities of any

> such companies, corporations, person or persons as aforesaid, to the owner or owners of said craft, boat or raft for injuries sustained by them by reason of such bridge, aqueduct or structure as aforesaid, under existing law. (Sec. 3, act of Mar. 30, 1860.)

Congress also has long been interested in the navigation of the Monongahela. By the act of June 18, 1878, it appropriated:

> For the improvement of Monongahela River, West Virginia and Pennsylvania, to be expended in completing lock and dam at Hoard's rocks, twenty-five thousand dollars. (20 Stat., 152, 155.)

And by the act of March 3, 1879, it further appropriated—

> For improving Monongahela River, West Virginia and Pennsylvania, to be expended in completing lock and dam at Hoard's rocks, twenty-four thousand dollars. (20 Stat., 363, 371.)

The act of Congress approved August 5, 1886, authorized and directed the Secretary of War—

> To ascertain the value and commercial importance of the works and property * * * of the Monongahela Navigation Company, situated on the Monongahela River, in the State of Pennsylvania; and in order to acquire such information the Secretary of War shall appoint a board of three competent engineers from the Engineer Corps of the United States Army, which board shall in each case

report to the Secretary of War, who shall report thereon to Congress at its next succeeding session; and the cost of such examination shall be paid out of the sum appropriated by this act for surveys: *Provided*, That nothing herein shall be construed as committing Congress to the purchase of the said works. (24 Stat., 310, 324.)

By the act of August 11, 1888, it was provided:

The Secretary of War be, and is hereby, authorized and directed to negotiate for and purchase, at a cost not to exceed one hundred and sixty-one thousand seven hundred and thirty-three dollars and thirteen cents, lock and dam number seven, otherwise known as "the Upper Lock and Dam," and its appurtenances, of the Monongahela Navigation Company, a corporation organized under the laws of Pennsylvania, which lock and dam number seven and its appurtenances constitute a part of the improvements in water communication in the Monongahela River, between Pittsburg, in the State of Pennsylvania, and a point at or near Morgantown, in the State of West Virginia. And the sum of one hundred and sixty-one thousand seven hundred and thirty-three dollars and thirteen cents, or so much thereof as may be necessary, is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, for consummating said purchase, the same to be paid on the warrant of the Secreatry of War, upon full and absolute conveyance to the United States of the said lock and dam number seven, and its appurtenances, of the said Monongahela Navigation Company.

In the event of the inability of the Secretary of War to make voluntary purchase of said lock and dam number seven and its appurtenances for said sum of one hundred and sixty-one thousand seven hundred and thirty-three dollars and thirteen cents, or a less sum, then the Secretary of War is hereby authorized and directed to institute and carry to completion proceedings for the condemnation of said lock and dam number seven and its appurtenances, said condemnation proceedings to be as prescribed and regulated by the provisions of the general railroad law of Pennsylvania, approved February nineteenth, eighteen hundred and forty-nine, and its supplements, except that the United States shall not be required to give any bond, and except that jurisdiction of said proceedings is hereby given to the circuit court of the United States for the western district of Pennsylvania, with right of appeal by either party to the Supreme Court of the United States: *Provided*, That in estimating the sum to be paid by the United States, the franchise of said corporation to collect tolls shall not be considered or estimated; and the sum of five thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, to pay the necessary costs of said condemnation proceedings; and upon final judgment being entered therein the Secretary of War is hereby authorized and directed to draw his warrant on the Treasury for the amount of said judgment and costs, and said amount for the payment thereof

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is hereby appropriated out of any moneys in the Treasury not otherwise appropriated. And when said lock and dam number seven and its appurtenances shall have been acquired by the United States, whether by purchase or condemnation, the Secretary of War shall take charge thereof, and the same shall thereafter be subject to the provisions of section four of an act entitled "An act making appropriations for the construction, repair, and preservation for certain public work on rivers and harbors, and for other purposes," approved July fifth, eighteen hundred and eighty-four. (25 Stat., 400, 411.)

The act of September 19, 1890, provided:

That whenever the proceedings commenced by the United States against the Monongahela Navigation Company, a corporation organized under the laws of Pennsylvania, to condemn lock and dam number seven, constituting a part of the improvement in water communication in the Monongahela River between Pittsburg, in the State of Pennsylvania, and a point at or near Morgantown, in the State of West Virginia, shall be finally determined, and the United States shall have acquired the title to said lock and dam number seven and its appurtenances, the Secretary of War be, and he is hereby, authorized and directed to negotiate for and purchase, at a cost not to exceed one hundred and sixty-two thousand dollars, lock and dam number six and its appurtenances, of the Monongahela Navigation Company, also constituting a part of said

improvements. And the sum of one hundred and sixty-two thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of any moneys in the Treasury not otherwise appropriated, for consummating said purchase, the same to be paid on the warrant of the Secretary of War, upon full and absolute conveyance to the United States of the said lock and dam number six and its appurtenances, of the said Monongahela Navigation Company.

In the event of the inability of the Secretary of War to make voluntary purchase of said lock and dam number six and its appurtenances for said sum of one hundred and sixty-two thousand dollars, or a less sum, then the Secretary of War is hereby authorized and directed to institute and carry to completion proceedings for the condemnation of said lock and dam number six and its appurtenances, said condemnation proceedings to be as prescribed and regulated by the provisions of the general railroad law of Pennsylvania, approved February nineteenth, eighteen hundred and forty-nine, and its supplements, except that the United States shall not be required to give any bond, and except that jurisdiction of said proceedings is hereby given to the Circuit Court of the United States for the Western District of Pennsylvania, with right of appeal by either party to the Supreme Court of the United States: *Provided*, That in estimating the sum to be paid by the United States, the franchise of said corporation to collect tolls shall not be considered or estimated; and the

sum of five thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, to pay the necessary costs of said condemnation proceedings; and upon final judgment being entered therein, the Secretary of War, if in his opinion the judgment is reasonable, is hereby authorized and directed to draw his warrant on the Treasury for the amount of said judgment and costs, and said amount for the payment thereof is hereby appropriated out of any moneys in the Treasury not otherwise appropriated. And when said lock and dam number six and its appurtenances shall have been acquired by the United States, whether by purchase or condemnation, the Secretary of War shall take charge thereof, and the same shall thereafter be subject to the provisions of section four of an act entitled "An act making appropriations for the construction, repair, and preservation for certain public work on rivers and harbors, and for other purposes," approved July fifth, eighteen hundred and eighty-four. (26 Stat., 426, 438–439.)

And finally the act of June 3, 1896, provided:

The Secretary of War is hereby authorized and directed to institute and carry to completion proceedings for the condemnation of all the property and its appurtenances of the Monongahela Navigation Company, a corporation of Pennsylvania, said condemnation proceedings to be as prescribed and regulated by the provisions of the general railroad law of Pennsylvania,

approved February nineteenth, eighteen hundred and forty-nine, and its supplements, except that the United States shall not be required to give any bond, and except that jurisdiction of said proceedings is hereby given to the Circuit Court of the United States for the Western District of Pennsylvania, with right of appeal by either party to the Supreme Court of the United States. And the sum of five thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, to pay the necessary costs of said proceedings; and upon final judgment being entered therein, the Secretary of War, if in his opinion the judgment is reasonable, is hereby authorized and directed to draw his warrant on the Treasury for the amount of said judgment and costs, and said amount for the payment thereof is hereby appropriated out of any moneys in the Treasury not otherwise appropriated. And when said property and its appurtenances shall have been acquired by the United States, whether by purchase or condemnation, the Secretary of War shall take charge thereof and the same shall thereafter be subject to the provisions of section four of an act entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," approved July fifth, eighteen hundred and eighty-four. (29 Stat., 202, 217–218.)

The case of *Monongahela Navigation Co.* v. *United States* (148 U. S., 312) arose out of the proceedings under the foregoing enactments for acquisition by the United States of the improvement works upon the Monongahela River.

Some, but much less than all, of the legislative history of the Monongahela River will be found in the case of *Monongahela Bridge Co.* v. *Kirke* (46 Pa. St., 112).

4. As to the proceedings before the hearing by the Secretary of War—

The proceeding began with a petition dated April 29, 1903, by numerous persons for an investigation by the Secretary of War (Rec., 52, 53). This petition was referred to Captain Sibert, of the Engineer Corps, "for investigation and report" (Rec., 54). Captain Sibert reported, under date September 8, 1903, stating that the bridge "certainly requires action under section 18, River and Harbor Act of March 3, 1899" (Rec., 55). The Chief of Engineers submitting this report to the Secretary of War, with his concurrence (Rec., 55), it was ordered by the Secretary of War that "the papers be returned to Captain Sibert, with instruction to hold a public hearing, after due notice to interested parties" (Rec., 55–56). All proceedings up to this point were obviously for the mere purpose of ascertaining whether the public complaint of the bridge was worthy of serious consideration and should induce formal investigation under the act of Congress.

The matter was sent to Captain Sibert for the purpose of "public hearing, after due notice to interested parties," on September 23, 1903 (Rec., 56); and Captain (then Major) Sibert held hearings as ordered between September 23, 1903, and May 23, 1904 (Rec.. 56). Major Sibert's report, after the public hearing, was made on the latter date, and is found on pages 57–63 of the record.

At the public hearing before Major Sibert plaintiff in error appeared, gave testimony, and filed a brief in defense of its bridge (Rec., 63).

It nowhere appears in the record of this case that plaintiff in error had not seen, before or at the hearings before Major Sibert, the previous preliminary report which Major Sibert had made on September 8, 1903. The presumption is that it did see that report before or at the public hearings, and that the original petition with all its indorsements made before the hearing was on view at the hearing.

Nor does this record contain the proceedings had or the testimony or documentary evidence given at the hearing before Major Sibert; but *all* the "stenographic records of the oral parts of the hearings" (Rec., 63) and "all papers connected with the recent hearings" (Rec., 57, 63) and the brief of the bridge company (Rec., 63) were returned to the Secretary of War on May 23, 1904, with Major Sibert's report. Before the Secretary of War made his decision, on August 10, 1904, that plaintiff in error's bridge was "an unreasonable obstruction to the free navigation of the said Monongahela River," he had under sub-

mission to him all the material which had been put before Major Sibert.

Further, and especially, it does not appear that plaintiff in error desired or requested to submit any evidence or arguments to the Secretary of War or to have any hearing before him beyond what had been done before Major Sibert.

5. As to the basis of the Secretary of War's personal action, nothing appears in the record. As already stated, there is no present showing of the testimony or documents which he had before him, through their return to him by Major Sibert after the close of the hearings before that officer. If that were now shown, it could not be told from the record what parts of such testimony or documents the Secretary of War deemed important or upon what parts of them he based his conclusion.

Nor does it appear anywhere in the record what theory of law the Secretary of War may have entertained or what specific tests he may have regarded as pertinent or important for determining the obstructiveness of the bridge. It can not be assumed that he used any rule or test that was erroneous, or even that his reasoning was identical with Major Sibert's.

6. As to the alleged adoption of this bridge by the United States as part of the national road from Cumberland, Md., to the Ohio River—

The evidence is merely that the national road was located in 1808 to reach the Monongahela River in the immediate vicinity of the later bridge site (Rec., 70,

74). This location was through action of the commissioners appointed for its location and approval of their action by President Jefferson. Travelers upon this road then crossed the Monongahela by "Kreps Ferry" (Rec., 75, 78). So things stood until plaintiff in error's bridge was built in 1833. The location of the bridge was made by the commissioners appointed under the Pennsylvania charter "as near where the national road crosses said river as the circumstances of the case would admit of" (Rec., 82). It appears, therefore, that the bridge settled down upon the road, instead of the road being put upon the bridge. However, obvious convenience induced travelers upon the road to use the neighboring bridge across the river; and in aid of that convenience a connecting road between the national pike and the bridge was built in 1837, upon recommendation of certain engineer officers (Rec., 76–78). There is no proof of the acquisition by the United States of any rights in the bridge or of a grant of any rights by the United States to the bridge company.

ARGUMENT.

While the record shows over thirty assignments of error, plaintiff in error confines itself to thirteen in its brief (pp. 29–35). These thirteen themselves reduce to certain central contentions, which may be met by the following propositions:

I. When plaintiff in error was chartered and when its bridge was built, the public already possessed,

as a matter of law, and they have since had—certainly against plaintiff in error—all the rights to use and improve the Monongahela River for navigation which belong to the public in navigable rivers generally; and so this case is directly within *Union Bridge Co.* v. *United States* (204 U. S., 364).

II. Plaintiff in error's attack upon the *Union Bridge Company* case is founded upon the identical claims which were urged in that case against the constitutionality of the act of Congress approved March 3, 1899, viz, that the act delegates legislative or judicial power to the Secretary of War and that it takes private property without compensation. Both of those claims having been elaborately considered and expressly rejected by this court in the Union Bridge Company case, they need no further discussion on the part of the Government.

III. Plaintiff in error had a full and fair hearing by the Secretary of War, as required by statute.

IV. Instead of its being true that the Secretary of War determined his judgment as to the unreasonable obstructiveness of this bridge by the application of erroneous tests or rules of law, the contrary must be presumed; for the record does not disclose what his processes of reasoning or grounds of decision were.

V. The act of Congress properly may, and in fact does, make the Secretary of War's decision conclusive that the bridge is an unreasonable obstruction. Plaintiff in error had no right to retry that question before the jury in this proceeding for violation of the Secretary's order.

VI. The bridge never became, in a legal view, part of the national road from Cumberland, Md.; and, if it had, the order of the Secretary of War requiring changes in the bridge for avoidance of obstruction of navigation would still be valid.

Concerning these several propositions—

I.

When plaintiff in error was chartered and when its bridge was built, the public already possessed, as a matter of law, and they have since had—certainly against plaintiff in error—all the rights to use and improve the Monongahela River for navigation which belong to the public in navigable rivers generally; and so this case is directly within Union Bridge Co. v. United States (204 U. S., 364).

Plaintiff in error has nowhere urged in its argument that the Monongahela was not a navigable river in fact in 1830, when the company was chartered, or in 1833, when the bridge was built. It did make that claim on the trial in the district court, and it introduced evidence in support of that claim, but the contention seems now to be abandoned.

Beyond that, there was ample evidence to sustain a finding by the jury of navigability in 1830 and 1833; and the jury in finding against plaintiff in error must be taken to have held the river then navigable.

It is nevertheless desirable to show briefly that from a time long before 1830 the Monongahela has been a navigable highway by statute, and that plaintiff in error at any rate is not free to object to the Secretary of War's order on the ground that the

river was not navigable when its bridge was built. Three lines of reasoning lead to these results:

1. It is important to bear in mind that the only materiality of this question whether the Monongahela was navigable when the bridge was built lies in the determination whether that river was a public way, in the sense that the public had an easement of use for passage or transportation; with the result that the bridge company's property, like all other private rights relating to the river, was subject from the start to the public right of using the river. The crucial question is whether from a time preceding defendant's charter the river was under a public servitude, with the enjoyment of which the bridge now interferes. If when the bridge company's charter was granted the river was a public highway, then that charter was upon the implied condition—no less potent than an express condition—that the bridge should not at any time obstruct navigation; and consequently a requirement that the bridge be altered so as no longer to obstruct navigation would be merely an assertion of the public right of use of the river, rather than the creation of any new right through a taking of private property.

The Pennsylvania act of April 17, 1782, simply and shortly disposes of the question. It says:

> That the said rivers [i. e., Monongahela and Youghiogheny] so far up as they or either of them have been *or can be* made navigable for rafts, boats, and canoes, and within the bounds and limits of this State, shall be *and are hereby*

declared to be public highways (2 Dallas' Laws of Pennsylvania, p. 58.)

This act makes all parts of the river within Pennsylvania a "public highway" forthwith, from its date. Its language is present, not prospective. Not merely the parts of the river which have already been made navigable, but equally those parts which thereafter "can be made" navigable, "are hereby declared to be" public highways. The statute creates in favor of the public an immediate easement of use for navigation, over all of the river within the State. It applies as much to the parts that by subsequent improvement can be made navigable as to the parts which already have become navigable.

This case involves no question whether such legislation is constitutional, as against private rights of property already vested. The legislative imposition of a public right of use upon the river is certainly good against a company receiving its bridge charter in 1830—forty-eight years after the public right had been affixed to the river.

Nor is there any strangeness in the public right being established in advance of actual public improvement of the river. The right ought to be procured or created before it is used; and the length of the interval between acquisition and actual use of the right is of no moment. Indeed, this legislation doubtless had among its chief purposes the frustration of just such a claim of private right in the river, uncontrolled by and obstructive of public use, as plaintiff in error advances.

What can judicial decision add to a statute as clear as this of 1782? The Pennsylvania courts, however, have considered similar acts.

In one case Chief Justice Gibson said:

> The Commonwealth, having dominion over navigable streams, and having a consequent right to dispose of them at pleasure, declared the Swatara a public highway in 1771; *and thus it was devoted to public use.* (*Union Canal Co.* v. *Landis*, 9 Watts, 228, 232.)

In 1807 the Pennsylvania legislature passed "an act declaring part of Brush Creek in the county of Bedford, and parts of Allegheny River and Oswayo and Conondau creeks, in the counties of Potter and McKean, and Bald Eagle Creek in Centre County, public streams or highways;" and the court said of this act:

> Looking to the general direction and scope of these provisions, I think it is obvious enough that the leading object of the legislature, when enacting the law of 1807, was to invest the several water courses named in it with the character of public and common thoroughfares, to be used by the people for purposes of transportation, in such manner as their lawful occasions might require. *Deddrick* v. *Wood*, 15 Pa. St., 9, 12.)

In another case it was said:

> The Ohio is not a navigable river in a strict English common-law sense, but having been by the act of assembly of the 21st of March, 1798, declared to be a public stream or high-

> way "for the passage of boats and rafts," the like incidents and consequences attach to it, so far at least as the ordinary purposes of navigation are concerned, and should be thus treated in the discussion and decision of the question involved in this cause. The river being therefore a public highway for the direct navigation of boats, is consequently such for all convenient purposes necessarily appertaining thereto. And of these there are perhaps none more particularly essential than the mooring of boats and other craft at the well-known landings and wharves on the stream. This right is as well secured and protected by law, as that of actual navigation. Indeed, it may be considered as a part and parcel of it, and is only subject to restriction on the principles that govern in the use of all public ways or streets. (*Baker* v. *Lewis*, 33 Pa. St., 301, 305.)

Examples of other Pennsylvania statutes making rivers public highways are found in

> *Coovert* v. *O'Conner*, 8 Watts, 470.
> *Dubois* v. *Glaub*, 52 Pa. St., 238, 242.

The Pennsylvania Mill-Dam Act of March 23, 1803, authorizing construction of dams by owners of lands "adjoining any navigable stream of water, declared by law a public highway," provided expressly that "the person or persons, his or their heirs and assigns, in erecting the said dam or dams or keeping them in repair, shall not obstruct or impede the navigation of such stream;" and a statute declaring a stream to be a public highway brings it within this Mill-Dam Act.

(*Barclay R. R. & Coal Co.* v. *Ingham*, 36 Pa. St., 194, 202.)

In other States acts declaring a stream to be a public highway are held to establish the public right of use.

People v. *Gutchers*, 48 Barb., 656.

Town of Pierrepont v. *Loveless*, 72 N. Y., 211, 216.

State v. *Dibble*, 49 N. C., 107, 111.

In this last case such a statute was made the basis of declaring a bridge a public nuisance; and the same case illustrates that the Pennsylvania acts of 1817 and 1822 for public improvement of the Monongahela might in themselves suffice to give the river a public character.

The act of 1782, by declaring the Monongahela to be a public highway, certainly attached to that river by law (as against a bridge subsequently chartered) all the public rights which exist generally over rivers navigable in fact.

2. In asking and accepting the State's consent to its bridging the river, the bridge company admitted the public character of the river, because otherwise it could build its bridge upon acquisition of the proper private titles, without the State's consent. By its representation and acknowledgment of the State's control over the matter, the bridge company induced the State's acquiescence in the construction of the bridge. If the company had proceeded to build the bridge without the State's sanction, the State might and doubtless would have interfered, by injunction

or otherwise. Having procured the allowance of the bridge's construction by recognizing the river as public and getting the State's approval on that basis, the bridge company can not now dispute the public right.

An analogy may be found in the estoppel upon a lessee to deny his lessor's title, so long as he retains the possession gained by recognizing that title. It would be a fraud for the lessee first to get possession by admitting title and then while still in possession to dispute it. So here, the bridge company got possession (by building its bridge without interruption from the State) through recognizing and treating the State as having public rights in the river and asking its consent as the owner of such rights. The company still retains that possession, keeping its bridge just where the State was induced to permit it to be put. Can the company in this situation gainsay the public right? Must it not first give up the possession which it got by treating the State as an owner, entitled to forbid erection of the bridge if it chose?

Further, the bridge company accepted a charter containing the clause that "the erection of said bridge shall not obstruct the navigation of said river so as to endanger the passage of rafts, steamboats, or other water craft." This was an express assertion by the State of a right on the part of the public then and at all times to navigate the river; and the company accepting the charter with that clause in it and building its bridge under that charter can not negative the State's assertion while it retains the benefit of the charter. It is estopped, both in pais and

by deed, to question the river's navigability when or since the charter was granted.

3. The provision of plaintiff in error's charter that "the erection of said bridge shall not obstruct the navigation of said river so as to endanger the passage of rafts, steamboats, or other water craft" requires the company to readjust its bridge to the needs of navigation from time to time, whether or not the river was navigable when the bridge was first built.

The language of the charter requiring the company not to obstruct the navigation of the river does not make that obligation depend upon the river's actual navigability when the charter was granted or when the bridge was built, or indeed upon any other condition whatsoever. The obligation assumed by the company in accepting the charter is absolute. Whenever and however the river might become navigable for "rafts, steamboats, or other water craft," thereupon it was made the duty (and the bridge company accepted the duty) not to obstruct such navigation. This is clear from the language of the charter.

Similar clauses, both as to bridges and as to railroad crossings over streets, have invariably been interpreted as imposing a *continuing* duty of not interfering with the rivers, or the streets, full use at any time, however much that use may have grown in amount or kind from what it was when the bridge or railroad charter was granted.

Thus, in *West Chicago Railroad* v. *Chicago* (201 U. S., 506) the charter of a company owning a tunnel under the Chicago River, which the city had required to be lowered in the interest of navigation by larger vessels than were used when the tunnel was built, provided that the company might "locate and construct its road upon or over any street, alley, road or highway, or across or over any waters in this State, in such manner as not to unnecessarily obstruct the public use of such street, alley, road or highway or interrupt the navigation of such waters" (p. 515). This court said of such provision:

> The provision in that statute forbidding any interruption of the navigation of the river had reference to the needs of navigation not only at the time the tunnel was constructed, but its needs at any subsequent period as found and declared by the city, upon reasonable grounds (pp. 523, 524).

And in *Union Bridge Co.* v. *United States* (204 U. S., 364) the charter of the bridge company was identical in wording with plaintiff in error's charter (p. 367), and this court said:

> Independent of the grounds upon which we thus place our decision, it is appropriate to observe that the conclusion reached finds support in the charter of the bridge company and in the law of Pennsylvania as declared by its highest court. The charter of the company, as we have seen, expressly warned the company that its bridge must not obstruct navigation—that is, in legal effect, navigation as it

then was, or might be at any subsequent time. In *Dugan* v. *Bridge Company* (27 Pa. St., 303, 309, 311), we have the case of a bridge company on which was conferred the franchise to erect and maintain a toll bridge across Monongahela River, coupled, however, with the condition that such bridge should not be erected "in such manner as to injure, stop, or interrupt the navigation of such river by boats, rafts, or other vessels." The Supreme Court of Pennsylvania interpreted these words as meaning that "the bridge was to be so built as not to injure, stop, or interrupt the navigation, either then or now, whether in its infancy or full growth." The same general question arose in *C., B. & Q. Railway Co.* v. *Drainage Comm'rs*, above cited. This court held that the adjudged cases "negative the suggestion of the railway company that the adequacy of its bridge and the opening under it for passing the water of the creek at the time the bridge was constructed determine its obligations to the public at all subsequent periods." In *Cooke* v. *Boston & Lowell R. R.* (133 Massachusetts, 185, 188) it appeared that a railroad company had statutory authority to cross a certain highway with its road. The statute provided that if the railroad crossed any highway it should be so constructed as not to impede or obstruct the safe and convenient use of the highway. And one of the contentions of the company was that the statute limited its duty and obligation to provide for the wants of travelers at the time it exercises the privilege granted to it.

The court said: "The legislature intended to provide against any obstruction of the safe and convenient use of the highway for all time; and if, by the increase of population in the neighborhood, or by an increasing use of the highway, the crossing which at the outset was adequate is no longer so, it is the duty of the railroad corporation to make such alteration as will meet the present needs of the public who have occasion to use the highway." In *Lake Erie & Western R. R. Co.* v. *Cluggish* (143 Indiana, 347), the court said (quoting from *Lake Erie & Western R. R. Co.* v. *Smith*, 61 Fed. Rep., 885): "The duty of a railroad to restore a stream or highway which is crossed by the line of its road is a continuing duty; and if, by the increase of population or other causes the crossing becomes inadequate to meet the new and altered conditions of the country, it is the duty of the railroad to make such alterations as will meet the present needs of the public." So, in *State of Indiana* v. *Lake Erie & Western R. R. Co.*, 83 Fed. Rep., 284, 287, which was the case of an overhead crossing lawfully constructed on one of the streets of a city, the court said: "If, by the growth of population or otherwise, the crossing has become inadequate to meet the present needs of the public, it is the duty of the railroad company to remedy the defect by restoring the crossing so that it will not unnecessarily impair the usefelness of the highway" (pp. 401, 402).

A similar view underlies *New Orleans Gas Light Co.* v. *Drainage Commission* (197 U. S., 453), where it was held that the Gas Light Company might be required, without compensation, to change the location of its pipes in the city streets for accommodation of other structures used for drainage.

As the above quotation from the *Union Bridge Company* case discloses, this same rule of continuing duty, measured by the varying needs of growing navigation, is established in Pennsylvania, and the doctrine of the Pennsylvania courts is conclusive upon the import of a Pennsylvania charter. (*Dugan* v. *Bridge Company*, 27 Pa. St., 303, 309, 311.)

And it is held by this court that the duty extends, in case of a railroad, to new streets opened after the railroad's construction; whether or not there is an express provision in the charter against unreasonable obstruction of or interference with streets. (*Northern Pacific Ry. Co.* v. *Duluth*, 208 U. S., 583, 595.)

Why, then, does not an explicit charter requirement that the bridge shall not obstruct navigation embrace a case where the needs of navigation arise through subsequent improvement of the river? That is no more than its admitted inclusion of enlarged and varied navigation beyond what was in existence when the charter was granted; and it is much less than the interpretation of a railway charter as containing an implied condition that the railway shall not obstruct a new street opened where before there was nothing

to suggest a subsequent street—as a river does suggest navigation in the future, if not in the present.

This clause in plaintiff in error's charter against obstruction of navigation must have meant *something*. If, however, the river was not navigable when the charter was granted, and if for that reason the clause of the charter against obstruction of navigation should be held not to operate in favor of a subsequently established navigation, *the clause would be reduced to nothing*. It would have neither present nor future application. Such result can not be allowable. Therefore we have this dilemma: If the river was navigable when the bridge was built, the bridge has always been subject, even apart from the express charter clause, to the public right of navigation. If, on the other hand, the river was not navigable when the bridge was built, the express charter clause against obstruction of navigation must protect navigation subsequently made possible through improvement of the river, for otherwise that charter clause comes at all times to naught.

Plaintiff in error being unable, for the three foregoing reasons, to resist the Secretary of War's order on the ground that the Monongahela was not navigable as early of 1830, this case falls directly within *Union Bridge Company* v. *United States* (204 U. S., 364).

II.

Plaintiff in error's attack upon the Union Bridge Company case is founded upon the identical claims which were urged in that case against the constitutionality of the act of Congress approved March 3, 1899, viz, that the act delegates legislative or judicial power to the Secretary of War and that it takes private property without compensation. Both of those claims having been elaborately considered and expressly rejected by this court in the Union Bridge Company case, they need no further discussion on the part of the Government.

1. The claim that the act of Congress delegates legislative or judicial power to the Secretary of War was considered and answered on pages 377–387 of the opinion in the *Union Bridge Company* case. The court's conclusion was expressed in the following language:

> It has long been the policy of the Government to remove such unreasonable obstructions to the free navigation of the waterways of the United States as were caused by bridges maintained over them. That such an object was of common interest and within the competency of Congress, under its power to regulate commerce, everyone must admit; for commerce comprehends navigation, and therefore to free navigation from unreasonable obstructions is a legitimate exertion of that power. *Gibbons* v. *Ogden*, 9 Wheat., 1, 189, 190. As appropriate to the object to be accomplished, as a means to an end within the power of the National Government, Congress, in execution of a declared policy, com-

mitted to the Secretary of War the duty of ascertaining all the facts essential in any inquiry whether particular bridges, over the waterways of the United States, were unreasonable obstructions to free navigation. Beyond question, if it had so elected, Congress, in some effective mode and without previous investigation through executive officers, could have determined for itself, primarily, the fact whether the bridge here in question was an unreasonable obstruction to navigation, and, if it was found to be of that character, could by direct legislation have required the defendant to make such alterations of its bridge as were requisite for the protection of navigation and commerce over the waterway in question. But investigations by Congress as to each particular bridge alleged to constitute an unreasonable obstruction to free navigation and direct legislation covering each case, separately, would be impracticable in view of the vast and varied interests which require national legislation from time to time. By the statute in question Congress declared, in effect, that navigation should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span, or other defects. It stopped, however, with this declaration of a general rule and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress, as well as the duty of enforcing the rule in such cases. In performing that duty the Secretary of War will only

> execute the clearly expressed will of Congress, and will not, in any true sense, exert legislative or judicial power (pp. 385, 386).

The contention now made for plaintiff in error that the cases cited by the court in support of its conclusion in the *Union Bridge Company* case are not applicable because they relate to the congressional control over communication and commerce with foreign countries, has no force, for two reasons:

(*a*) While the power of Congress to allow or to inhibit foreign communication and commerce is absolute, that power does not belong to others than Congress. Legislative control of such foreign intercourse therefore can not be delegated by Congress any more than other legislative powers. Accordingly, the decisions that particular statutes in control of foreign intercourse did not delegate legislative power are in point generally.

(*b*) The question whether a particular obstruction of the public right of navigation is unreasonable and shall be stopped is political or legislative rather than judicial, just as is the question whether foreign intercourse shall be allowed or prohibited. This results from the fact that the public right of navigation is a proprietary interest in or over the navigable river; and nobody has any right to interfere with the public proprietary right of navigating the river unless he obtains the consent of the public as proprietor, through permission from the proper legislative agent of the public. It is not for courts to say whether an obstruction of the right of navigation shall be allowed, or how

much of an obstruction will be tolerated. Those questions are for the state legislature, as respects domestic navigation, and are for Congress as respects interstate navigation.

Through its charter from Pennsylvania plaintiff in error got no consent to *any* obstruction of the right of the public of the United States to navigate the Monongahela River in interstate commerce; or, at any rate, plaintiff in error got a consent which was subject at all times to revocation or modification by Congress, as the legislative agent of the public of the United States. The power of Congress to allow or to forbid even the slightest obstruction of interstate navigation upon the Monongahela River was the same as if no state charter had been given, and was the same, indeed, as if plaintiff in error had come to Congress at the outset and asked its consent to an obstruction. When a congressional charter for a bridge over an interstate stream is sought, the questions whether it shall be granted and how much of an obstruction of navigation by the bridge shall be sanctioned are palpably political and not judicial; and the same is true concerning the power of Congress over obstruction of interstate navigation by a bridge erected under state charter.

2. The claim that the order of the Secretary of War takes private property without compensation was answered on pages 388-402 of the opinion in the *Union Bridge Company* case; and the answer is, fundamentally, that the bridge, like private property in riparian lands or in the bed of the river, is subject to

the full assertion and exercise by the public of their dominant right or easement to navigate the river. This again shows how the question whether an obstruction of the public right of navigation shall be allowed, to any extent, is political or legislative rather than judicial.

On page 113 of its brief plaintiff in error asserts that the changes required in its bridge by the Secretary of War amount to a taking of private property, though the changes directed in the Union Bridge Company's bridge did not. The alterations required by the Secretary of War in the two bridges not only are of the same nature, but they are even of similar extent and costliness. A clear headroom of 70 feet and two spans each of the clear width of 394 feet were required in the Union Bridge Company's bridge (p. 370); in plaintiff in error's bridge a clear height of 52 feet and a span of 390 feet were required (Rec., 64).

III.

Plaintiff in error had a full and fair hearing by the Secretary of War, as required by statute.

1. Plaintiff in error appeared at the public hearing before Major Sibert, gave evidence, and made argument (Rec., 63).

2. It is not shown in the record what proceedings were had or what evidence was given at the hearing before Major Sibert. Insufficiency of hearing can not be presumed, nor can it be supposed that plaintiff in error was refused the privilege of showing anything or of making any argument that it desired.

3. It is said that Major Sibert prejudged the case before the public hearing, because he reported the bridge as an obstruction before the Secretary of War ordered the public hearing. Not so, for Major Sibert was first acting only tentatively for the purpose of advising the Secretary of War whether the complaint which had been lodged against the bridge merited attention. It will not be inferred that the engineer officer entered upon the public hearing in any unfair spirit or that during the hearing he was unwilling to be convinced.

Further, the real hearing was not by Major Sibert, but by the Secretary of War. The engineer officer was merely the latter's agent to receive and report evidence and arguments. The decision was made by the Secretary of War, not by Major Sibert.

4. All proceedings, evidence, and arguments at the public hearing were transmitted to the Secretary of War (Rec., 63), and the latter gave his decision in view of all data presented by plaintiff in error.

5. It was not necessary that the Secretary of War should receive the evidence and arguments directly. That would be wholly impracticable as well as superfluous. Whatever plaintiff in error desired to get before the Secretary of War it could introduce before the engineer officer. Even courts take evidence otherwise than personally and directly before masters in chancery, referees, commissioners, examiners, etc.

6. Plaintiff in error did not request that it be permitted to introduce further evidence or to offer further argument before the Secretary of War. It is there-

fore in no position to criticise or to object to the sufficiency of its hearing. Complaint certainly can not now be made of the course of the proceedings before or at the instance of the Secretary of War, when no complaint concerning the character or the extent of the proceedings was made to the Secretary of War himself.

In the *Union Bridge Company* case further hearing was asked by the bridge company, but it was refused (p. 371), and the proceedings were upheld. In this case no suggestion was made that further or different hearing was desired.

IV.

Instead of its being true that the Secretary of War determined his judgment as to the unreasonable obstructiveness of this bridge by the application of erroneous tests or rules of law, the contrary must be presumed, for the record does not disclose what his processes of reasoning or grounds of decision were.

1. As already stated, even the proceedings before Major Sibert are not in the record; and therefore it does not appear what the Secretary of War had before him. Even if all the data submitted to him were in the record, it could not be told what he deemed pertinent or important. He gave no opinion and made no findings, except his general conclusion that the bridge is an unreasonable obstruction of navigation.

2. Specifically, it is not shown whether the Secretary of War considered or failed to consider the amount and character of traffic upon the bridge.

Plaintiff in error asserts that Major Sibert neglected to take that traffic into account, in supposed disregard of the rule stated in *Escanaba Company* v. *Chicago* (107 U. S., 678). If so, it does not follow that the Secretary of War did the same.

3. The case of *Escanaba Company* v. *Chicago* has no pertinence here. This court was then passing upon the validity of an ordinance of the city of Chicago forbidding the opening of draw bridges across the Chicago River during certain parts of the day; and the court said that the amount and character of the traffic over the bridges might properly be considered by the local legislature in requiring temporary obstruction of navigation. The same consideration might well affect Congress when determining whether or not to allow an obstructive bridge; but it is irrelevant to the inquiry before the Secretary of War whether, under an act of Congress forbidding bridges which are "an unreasonable obstruction to the free navigation" of a river, a particular bridge transgresses the enactment. Under such a statute the only inquiry before the Secretary of War is how the bridge affects navigation, not whether the interests of land travel justify a substantial impairment of navigation.

Further, the travel and traffic over this bridge will not be interrupted at all by the increased height of the bridge or by the increased width of its channel span. The amount and character of that travel and traffic therefore do not at all affect the reasonableness of the obstruction of navigation by the bridge.

V.

The act of Congress properly may, and in fact does, make the Secretary of War's decision conclusive that the bridge is an unreasonable obstruction. Plaintiff in error had no right to retry that question before the jury in this proceeding for violation of the Secretary's order.

1. The fundamental and decisive consideration as to this point is that in determining whether the bridge is an unreasonable obstruction of navigation the Secretary of War acts as the agent of Congress to decide what Congress itself might decide directly. In the quotation already made from the *Union Bridge Company* case, it was said:

> Beyond question, if it had so elected, Congress in some effective mode and without previous investigation through executive officers, could have determined for itself, primarily, the fact whether the bridge here in question was an unreasonable obstruction to navigation, and, if it was found to be of that character, could by direct legislation have required the defendant to make such alterations of its bridge as were requisite for the protection of navigation and commerce over the waterway in question (p. 386).

As said in *Field* v. *Clark* (143 U. S., 649), the Secretary of War "was the mere agent of the law-making department to ascertain and declare the event upon which its express will was to take effect" (p. 693).

The power of Congress itself to decide whether it will permit such obstruction of navigation as the bridge causes, or how much obstruction it will allow,

comes from the fact that nobody has a right to interfere with the public right of navigation at all without the consent of the public; and the question of consenting to an obstruction of navigation, or of determining how much obstruction will be allowed, belongs as a political or legislative question to Congress, because it (and not a court) is the agent of the public to manage and control the public right of navigation.

If Congress had decided directly that this bridge of plaintiff in error is an unreasonable obstruction of navigation, its decision would obviously be final in the courts. The same finality must attach to the decision of the same question by the agent of Congress for its decision—the Secretary of War.

In *State of Pennsylvania* v. *Wheeling and Belmont Bridge Co.* (13 How., 518) a bridge over the Ohio River was ordered abated as a nuisance unless changed so as not to interfere with navigation; but after this judgment Congress sanctioned the bridge as it was, and thereupon this court held the congressional sanction of the existing structure to justify the obstruction. The action of Congress was held final upon the amount of obstruction which should be permitted. Equally, the amount of obstruction which will not be suffered is for Congress to decide, either directly or through such agent as it appoints for the purpose.

A reference to the courts of this question, whether a bridge unreasonably obstructs navigation, would be

abnormal if not unconstitutional, because such question is political or legislative, and not judicial in its nature.

The claim that plaintiff in error is entitled to a jury trial of the question whether its bridge unreasonably obstructs navigation, in as much as a criminal prosecution is brought against it, is already answered. A jury trial is demandable upon judicial questions, but not upon questions of a legislative character, which Congress may decide itself. If Congress in fact had decided directly that plaintiff in error's bridge is an unreasonable obstruction, and plaintiff in error were being prosecuted for disobedience of a direct order of Congress that its bridge be altered unless removed, would plaintiff in error be entitled to have a jury revise the decision of Congress? And why is plaintiff in error any more entitled to have a jury revise the decision of the Secretary of War as the agent of Congress?

2. The language of the statute carries no suggestion that the Secretary of War's decision may be reviewed in the prosecution for its disobedience.

It nowhere intimates that anybody but the Secretary of War shall pass upon the obstructiveness of the bridge. On the contrary, after saying that he shall determine the question, the act declares that the owner of the bridge, if he "willfully fail or refuse to remove the same or to comply with the lawful order of the Secretary of War in the premises," shall be deemed guilty of a misdemeanor and shall be punished by a fine of not more than five thousand dollars

for each month of continued disobedience. The liability of the bridge owner is imposed, not in terms which make it depend upon the court's finding navigation to be obstructed, but directly and absolutely for disobedience to the Secretary of War's order.

Nor does any difficulty or doubt arise from the statutory mention of "lawful order of the Secretary of War," for that language contemplates the right of the court to inquire into the jurisdiction of the Secretary of War in a particular case and into the regularity of his proceedings under the statute. There are many things, altogether apart from the obstructiveness of the bridge, which the court may and in proper case must determine in the criminal prosecution; *e. g.*, defendant's ownership of the bridge, the public character or navigability of the river, the giving of proper notice of hearing before the Secretary, the actual allowance of proper hearing before the Secretary, the service upon the bridge owner of the Secretary's order requiring changes, and the actual disobedience of the Secretary's order. Such things as these are the proper subject-matter of the court's inquiry.

3. Review of the question of unreasonable obstruction by the jury in the prosecution for disobedience of the Secretary's order would be utterly impractical. Different positions might and probably would be taken by different juries as to the amount of obstruction of navigation that ought to be tolerated. There could be no assurance of consistency of decision or regulation as to the same river, if the question were

left to juries. On the Monongahela, for example, a bridge at one place might be allowed with a clearance of only 20 feet, while at all other places the bridges were required to be 40 feet above the river. One jury's verdict might destroy much or all of the serviceableness belonging to the river at all points but the one affected by the verdict.

4. Is the jury to decide what changes in the bridge are necessary to remove the obstruction of navigation or to make it reasonable? That is involved, if the jury is to decide whether the bridge as it stands is an unreasonable obstruction; because the kind and extent of necessary changes in the bridge depend upon and can not be determined without first ascertaining, wherein and to what extent the bridge unreasonably obstructs. The Secretary of War can not, as the statute requires, prescribe the changes to be made in the bridge if he is not the real and final judge whether and wherein the existing bridge is an unreasonable obstruction.

5. The elaborate consideration given in the *Union Bridge Company* case to the point of alleged delegation of legislative or judicial authority to the Secretary of War was altogether unnecessary if the Secretary's order is not the real, i. e., the concluding, decision whether the bridge needs alteration in order to discontinue obstruction. It could not be said that any determining or controlling power was conferred on the Secretary of War if the court were required to decide the matter for itself, instead of merely enforcing the Secretary's decision.

VI.

The bridge never became, in a legal view, part of the national road from Cumberland, Md.; and if it had, the order of the Secretary of War requiring changes in the bridge for avoidance of obstruction of navigation would still be valid.

1. As recited in the preliminary statement of facts, the national road was not located upon the bridge, but the bridge was located in the immediate vicinity of the road twenty-five years or more after the latter was built. Then, naturally, travelers upon the road found it convenient to use the bridge across the river; and, accordingly, a short connecting road was constructed between the two. The United States never acquired, however, any interest in the bridge.

The use of a neighboring bridge by travelers upon the road certainly can not make the bridge a part of the road, in legal view, or give to the bridge a Federal sanction.

2. Further, the construction of the short piece of road between the national highway and the bridge in 1837 or thereabouts was by executive officials of the United States, without any action of Congress. (Rec., 75–78.) A Federal privilege of obstruction of interstate commerce by this bridge could be given only by Congress. The trial judge said on this subject:

> But it is further urged that the bridge was adopted by the Government as an integral part of the national pike, the ferry crossing the river being given up and the two ends of the road relocated so as to connect with the approaches to it. By this, as it is contended,

> the bridge was recognized as a lawful structure, the mails being also carried over it as a regularly established post route. But the sanction that was so given, if any, proceeded not from Congress, which alone had authority to legalize it, but from the executive branch of the Government which had no such power. Conceding then that if Congress had acted in the premises the right to maintain the bridge could not be withdrawn without first providing compensation, there is no such result where the only adoption of the bridge was of the character thus shown. (Rec., 17, 18.)

3. If the bridge had been made by the United States an integral part of the national road, it would make no difference with the present case, for two reasons—

(*a*) Such Federal sanction of the bridge would be upon the implied condition that it should at no time obstruct navigation. (*C. B. & Q. R. R. Co.* v. *Drainage Commissioners*, 200 U. S., 561, 586.)

It was there said:

> It may be—and we take it to be true—that the opening under the bridge as originally constructed was sufficient to pass all the water then or now flowing through the creek. But the duty of the company, implied in law, was to maintain an opening under the bridge that would be adequate and effectual for such an increase in the volume of water as might result from lawful, reasonable regulations established by appropriate public authority from time to time for the drainage of lands on either side of the creek (p. 586).

To like effect:

Northern Pacific Ry. Co. v. *Duluth*, 208 U. S., 583.

New Orleans Gas Light Co. v. *Drainage Commissioners*, 197 U. S., 453.

(C.) In the present case, however, we have the express charter clause against obstruction of navigation, which makes any implication of such condition in the alleged federal sanction unnecessary. If the United States could be regarded as having adopted or sanctioned this bridge as part of the national road, it would be upon the terms of the state charter. If the United States adopted the bridge at all it was with the express restriction upon the bridge in favor of navigation.

CONCLUSION.

The judgment below should be affirmed.

LLOYD W. BOWERS,
Solicitor-General.

JANUARY, 1910.

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